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No.

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES D. MARSHALL, WARDEN, *Petitioner,*

v.

ROBERT HENRY, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal court may order an evidentiary hearing on a freestanding claim of actual innocence by a noncapital habeas applicant making a "reasonably low threshold" showing of "a colorable claim for relief and the lack of a factual finding" in the state court.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
RELEVANT STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
A. In Accepting a Freestanding Claim of Innocence in this Noncapital Case, The Ninth Circuit's Decision Conflicts With *Herrera* v. *Collins*	7
B. The Ninth Circuit Decision Also Conflicts With Those of Other Circuits, None of Which Treats Innocence Claims as Cognizable in Noncapital Federal Habeas Proceedings	9
C. The Ninth Circuit Ignored This Court's Requirement That The Showing Necessary For Obtaining An Evidentiary Hearing On An Innocence Claim Must Be "Extraordinarily High"	11
CONCLUSION	17

TABLE OF AUTHORITIES

Cases	Page
Barefoot v. *Estelle*, 463 U.S. 880 (1983)	8
Bradshaw v. *Stumpf*, 545 U.S. 175 (2005)	8, 15
Brownlee v. *Haley*, 306 F.3d 1043 (11th Cir. 2002)	10
Burton v. *Dormire*, 295 F.3d 839 (8th Cir. 2002)	10
Coley v. *Gonzales*, 55 F.3d 1385 (9th Cir. 1995)	5, 9
Cress v. *Palmer*, 484 F.3d 844 (6th Cir. 2007)	13
David v. *Hall*, 318 F.3d 343 (1st Cir. 2003)	10
Felker v. *Turpin*, 83 F.3d 1303 (11th Cir. 1996)	9
Fielder v. *Varner*, 379 F.3d 113 (3d Cir. 2004)	10
Foster v. *Quarterman*, 466 F.3d 359 (5th Cir. 2006)	10

TABLE OF AUTHORITIES (continued)

	Page
Herrera v. *Collins*, 506 U.S. 390 (1993)	4, 5-11, 12, 13, 14, 16
House v. *Bell*, 126 S. Ct. 2064, 126 L. Ed. 2d 1 (2006)	11, 13
In re Brown, 457 F.3d 392 (5th Cir. 2006)	13
In re Hall, 30 Cal.3d 408, 637 P.2d 690 (1981)	9
Johnson v. *Bett*, 349 F.3d 1030 (7th Cir. 2003)	10
LaFevers v. *Gibson*, 238 F.3d 1263 (10th Cir. 2001)	10
Lucas v. *Johnson*, 132 F.3d 1069 (5th Cir. 1998)	9
Rouse v. *Lee*, 339 F.3d 238 (4th Cir. 2003) (en banc)	10
Schlup v. *Delo*, 513 U.S. 298 (1995)	7, 8, 11-13
Stafford v. *Saffle*, 34 F.3d 1557 (10th Cir. 1994)	13
Teague v. *Lane*, 489 U.S. 288 (1989)	5

TABLE OF AUTHORITIES (continued)

	Page
Townsend v. *Sain*, 372 U.S. 293 (1963)	8
Zuern v. *Tate*, 336 F.3d 478 (6th Cir. 2003)	10
Constitutional Provisions	
California Constitution Art. VI § 10	9
Statutes and Other Authorities	
28 U.S.C. § 1254(1)	2
§ 2254	2
Antiterrorism and Effective Penalty Act of 1996 (AEDPA), 110 Stat. 1214	4
California Government Code § 12020(a)	9
California Penal Code § 1473(a)	9

TABLE OF AUTHORITIES (continued)

	Page
Court Rules	
Federal Rule of Appellate Procedure	
Rule 28(j)	5
Rule 32.1(a)	11
Ninth Circuit	
Rule 22-1(f)	5
Rule 36-3(b)	11

IN THE SUPREME COURT OF THE UNITED STATES

No.

CHARLES D. MARSHALL, WARDEN, *Petitioner,*

v.

ROBERT HENRY, *Respondent.*

Charles D. Marshall, Warden,[1] respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit, and its order denying rehearing and rehearing en banc, are unreported. (Petition Appendix ["App."] 1a, 5a.) The opinion of the United States District Court for the Eastern District of California denying the petition for writ of habeas corpus is unreported. (App. 6a.) The opinion of the California Court of Appeal affirming the judgment of conviction is unreported. (App. 23a.) The orders of the California Supreme Court denying direct review and two petitions for writ of habeas corpus are unreported. (App. 56a - 58a.)

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1. Warden Charles D. Marshall was respondent's custodian during the federal habeas proceedings below. Warden Tony Hedgpeth is respondent's current custodian.

STATEMENT OF JURISDICTION

The opinion of the court of appeals was filed on March 12, 2007. The order denying the State's petition for rehearing and rehearing en banc was filed on May 16, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 2254 of Title 28 of the United States Code provides in part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

Respondent Robert Henry recruited Francis Lee Brewer to avenge a drug-related robbery, but the wrong man died in the murder-for-hire. Respondent, Brewer, and Jester Taggart were tried for the murder in three separate California jury trials over a two-year period. This habeas corpus case arises from respondent's claim that testimony from Brewer's trial and his own post-trial declaration now show him to be factually "innocent" of the murder.

1. The evidence presented at respondent's trial—primarily testimony from eyewitnesses and respondent's statements to police—showed the following. Early on Thanksgiving Day 1985, Cedric Turner and a cohort robbed respondent at gunpoint, taking respondent's money and the cocaine he sold. Respondent, along with his 17-year-old cousin Jester Taggart and his 16-year-old brother Jeffrey Taggart, decided Turner had to die. Respondent met with Brewer and Bernard Oden, and hired Brewer to kill Turner. After Thanksgiving dinner, respondent and the Taggarts confronted Turner on the street, saying he "was gonna die."

A large crowd gathered, and Turner fled to a nearby house, where Andre Johnson offered to help him get away. Turner got into Johnson's car. Johnson stood outside his car, arguing with respondent and members of the crowd.

Brewer drove up in another car with Oden in the passenger seat. Respondent pointed out Turner to Brewer, saying, "That's the guy." Brewer reached over Oden and fired a sawed-off .22-caliber rifle out the passenger window. Three bullets hit the car and four hit Johnson, killing him.

The next day, Brewer sought payment from respondent, saying he had "taken care of it," but respondent said he had shot the wrong person and reduced the fee. Respondent later was arrested. The police asked him, in a tape-recorded interview, if he had offered Brewer $200 to shoot Turner. Respondent replied, "I didn't offer him $200 . . . I offered him $50." Respondent also told the police, "I hired Lee Brewer to kill Cedric Turner. He killed the wrong guy. I can't understand why I'm being charged." (See App. 23a - 26a.)

Respondent did not testify at his 1986 murder trial. His defense was that Brewer shot Johnson on purpose for some unknown independent reason of his own, and thus the doctrine of transferred intent did not apply to respondent. In support of that defense, a criminalist testified that the bullet trajectories suggested Johnson was the intended target. The defense also presented a psychologist who testified that Henry's I.Q. was 75. (See App. 26a - 27a.) Respondent was convicted of first degree murder and sentenced to prison for life without the possibility of parole.

2. Jester Taggart was tried as an adult ten days after respondent's trial and convicted of second degree murder. In 1988, at a third trial, Brewer also was convicted of second degree murder. Brewer's jury found an allegation that he personally used a firearm in Johnson's killing not true.

3. Jeffrey Taggart testified at all three trials under a grant of transactional immunity. His statements changed with each telling. Days after the killing, Jeffrey told the police that he was in the crowd, approached Brewer's car and saw the rifle between the seats, and witnessed Brewer fire shots out the driver's side window. At respondent's trial, Jeffrey

testified that he saw Oden fire the shots out the driver's side window. While there is no available record of Jester Taggart's trial, Jeffrey indicated at Brewer's trial that his testimony at Jester's trial was similar to his testimony at respondent's trial. At Brewer's trial, Jeffrey stated for the first time that he was actually in the car with Brewer and Oden, and that Oden shot Johnson on purpose for "talking too much." Jeffrey claimed he had identified Oden as the shooter to the police, despite a tape-recording of Jeffrey's 1985 interview showing he had identified Brewer.

Charles Austin, a convicted felon, testified only at Brewer's trial. He had discussed the case with Brewer in jail and again after Austin's release. Austin testified that he was selling cocaine on the street when he saw the passenger in the car fire the shots. Austin, however, could not describe the shooter, the victim, the gun, the shooter's car, or the victim's car. Austin's testimony also contradicted Jeffrey Taggart's version of events; Austin knew Jeffrey, but said he did not see Jeffrey at the scene.

4. In 1988, the California Court of Appeal affirmed respondent's judgment of conviction. (App. 23a.) In 1989, the California Supreme Court denied review. (App. 58a.) Respondent subsequently filed a habeas corpus petition in state court, claiming that newly discovered evidence from Brewer's trial showed him to be innocent. In 1989, the California Supreme Court denied relief. (App. 57a.)

5. In 1994, respondent filed a federal habeas corpus petition in the district court claiming, inter alia, actual innocence based on evidence from the Brewer trial.[2] While the federal case was pending, respondent filed another habeas corpus petition raising actual innocence in the California Supreme Court, which was denied. (App. 56a.) The State contended in district court that *Herrera* v. *Collins*, 506 U.S. 390 (1993), barred freestanding actual innocence claims in noncapital cases.

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2. Accordingly, this case is not governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214.

In 2005, the district court denied respondent's petition. It assumed the actual innocence claim was cognizable. However, after considering Jeffrey Taggart's and Charles Austin's testimony at the Brewer trial, the verdicts at the various trials, and respondent's statements to the police, the district court found that respondent did not meet the heavy burden of proof required for such a claim. (App. 10a - 13a.)

6. Respondent asserted the actual innocence claim as an uncertified issue in the court of appeals. Pursuant to Ninth Circuit Rule 22-1(f), the State did not address that claim, until the court invited oral argument on whether to certify and order an evidentiary hearing on the claim. In a letter brief filed pursuant to Federal Rule of Appellate Procedure 28(j), and at oral argument, the State again relied on *Herrera* v. *Collins*, 506 U.S. 390, to argue that respondent's freestanding actual innocence claim was not cognizable on federal habeas corpus.

10. On March 12, 2007, without seeking further supplemental briefing, the Ninth Circuit filed a memorandum opinion certifying the claim and remanding for an evidentiary hearing. Citing *Herrera*, 506 U.S. at 417-419, the Ninth Circuit held that respondent could have a "valid freestanding claim of actual innocence," and that he had met a "'reasonably low threshold' to receive an evidentiary hearing, [by] showing only a colorable claim for relief and the lack of a factual finding below." The Ninth Circuit concluded simply that, "If truthful, the testimony of Jeffrey Taggart and Charles Austin would prove that [respondent], while possibly guilty of solicitation, conspiracy, and attempt for hiring a hit man, is not guilty of first degree murder." (App. 3a - 4a.)

The State petitioned for panel rehearing and rehearing en banc. Besides explaining that *Herrera* prohibits freestanding actual innocence claims in noncapital federal habeas cases, the State observed that the panel's decision conflicted with published circuit law, *Coley* v. *Gonzales*, 55 F.3d 1385, 1387 (9th Cir. 1995), as well as decisions by every other circuit court to address such a claim, and that the decision granted relief based on a "new rule" in violation of *Teague* v. *Lane*,

489 U.S. 288 (1989). The State further argued that petitioner had failed to make a "truly persuasive" showing that "unquestionably establishes innocence." (App. 5a..) The Ninth Circuit, however, denied rehearing.

REASONS FOR GRANTING THE WRIT

THE NINTH CIRCUIT'S ERRONEOUS DECISION CONFLICTS WITH THIS COURT'S DECISION IN *HERRERA* V. *COLLINS* AND WITH DECISIONS OF OTHER CIRCUITS AND IMPLICATES PROFOUND QUESTIONS OF FEDERALISM AND COMITY UNDERLYING FEDERAL HABEAS CORPUS

1. The Ninth Circuit's decision to order an evidentiary hearing on a freestanding factual innocence claim by a noncapital state prisoner is, so far as the State knows, unprecedented. *Herrera* v. *Collins*, 506 U.S. at 400, recognized what the court of appeals did not: "Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." The Ninth Circuit erred by relying, apparently, on an assumption in *Herrera* that a freestanding actual innocence claim in a capital case might warrant habeas relief "if there were no state avenue open to process such a claim." *Id.* at 417. But this is not a capital case; and California affords several avenues of remedy for innocence claims.

In noncapital cases at least, freestanding innocence claims are the exclusive province of state courts. By exposing a long final state criminal judgment of first degree murder to retrial before a federal habeas court, the Ninth Circuit usurped the role of California's criminal courts and ignored the finding of a jury that fairly determined respondent's guilt. The Ninth Circuit's decision profoundly erodes the States' significant interests in federalism, comity, finality of criminal convictions, and the primacy of the jury as the truthfinding entity in the criminal justice process.

The decision below, moreover, conflicts with that of every

other circuit court respecting freestanding innocence claims in noncapital habeas corpus cases.

2. In any event, the Ninth Circuit erroneously applied what it acknowledged to be a "low" standard for ordering an evidentiary hearing. But *Herrera* held that "the threshold showing for such an assumed right would necessarily be extraordinarily high." 506 U.S. at 417. The Ninth Circuit also made no effort to assess the reliability or prob .tive force of the proffered evidence of respondent's innocence, or to evaluate that evidence against the evidence of guilt adduced at his trial. See *Schlup* v. *Delo*, 513 U.S. 298, 324, 332 (1995).

Even at a "reasonably low" level of scrutiny, the testimony by Jeffrey Taggart and Charles Austin at the Brewer trial did not approach a showing of respondent's actual innocence. Moreover, the Ninth Circuit failed to consider the strong evidence of respondent's guilt, including his own statements, introduced at his trial.

The Ninth Circuit's decision threatens innumerable federal retrials of state judgments in the future. Based on the trivial fact of different testimony and findings at a codefendant's trial in this case, it compels the State to expend substantial state resources to duplicate its proof beyond a reasonable doubt that respondent committed first degree murder for financial gain. Per curiam reversal is warranted on that basis alone.

A. In Accepting a Freestanding Claim of Innocence in this Noncapital Case, The Ninth Circuit's Decision Conflicts With *Herrera* v. *Collins*

Citing *Herrera* v. *Collins*, 506 U.S. at 417-19, the Ninth Circuit held that a noncapital prisoner may have a "valid freestanding claim of actual innocence" on federal habeas review. (App. 3a.) But *Herrera* recognizes that freestanding claims of actual innocence "have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state

criminal proceeding." *Herrera*, at 400; accord, *Townsend* v. *Sain*, 372 U.S. 293, 317 (1963) ("the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus"); see *Bradshaw* v. *Stumpf*, 545 U.S. 175, 191 (2005) (Thomas, J., concurring) ("At most, the evidence and purportedly inconsistent theory presented at Wesley's trial would constitute newly discovered evidence casting doubt on the reliability of Stumpf's death sentence, a sort of claim that our precedents and this Nation's traditions have long foreclosed.").[3/]

This Court in *Herrera* relied on several important principles. First, "federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact." *Herrera*, at 400. Second, "in state criminal proceedings the trial is the paramount event for determining the guilt or innocence of the defendant." *Id.* at 416; accord, *Barefoot* v. *Estelle*, 463 U.S. 880, 887 (1983) ("Federal courts are not forums in which to relitigate state trials."). Third, federal freestanding actual innocence claims implicate the States' "powerful and legitimate interest in punishing the guilty, and the nature of state-federal relations." *Herrera* at 421 (O'Connor, J., concurring). For these reasons, the Court warned that "[f]ew rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence." *Id.* at 401. In contrast, the Ninth Circuit's holding seriously undermines these principles of federalism, comity, finality, and the jury's fact-finding primacy, by allowing a federal court, not a state jury, to determine a defendant's guilt.

It is true that this Court in *Herrera* assumed, without deciding, that "*in a capital case* a truly persuasive demonstration of 'actual innocence' made after trial would

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3. Federal habeas courts may consider actual innocence claims that are offered to overcome a procedural bar, or are linked to a constitutional violation. See *Schlup* v. *Delo*, 513 U.S. at 314-15. Respondent's claim falls into neither category, it has always been a freestanding claim.

render the execution of a defendant unconstitutional, and warrant federal habeas relief *if there were no state avenue open to process such a claim.*" *Herrera,* at 417, emphasis added; see *id.* at 426 (O'Connor, J., concurring) (actual innocence claims should be "reserved for 'extraordinarily high' and 'truly persuasive demonstrations of "actual innocence"' *that cannot be presented to state authorities,*" emphasis added). But this case is not a capital case. And California affords respondent state avenues for pursuit of his freestanding innocence claim. These include state-court collateral review, Cal. Const., Art. VI § 10; Cal. Penal Code § 1473(a); *In re Hall*, 30 Cal.3d 408, 637 P.2d 690 (1981), and executive clemency, Cal. Govt. Code § 12020(a).[4/] Thus, to the extent *Herrera* suggests an exception to the general bar on federal freestanding innocence claims, it does not apply here. See *Felker* v. *Turpin*, 83 F.3d 1303, 1312 (11th Cir. 1996) (innocence claim not cognizable because petitioner could file new trial motion); *Lucas* v. *Johnson*, 132 F.3d 1069, 1075 (5th Cir. 1998) (innocence claim not cognizable because petitioner could seek clemency).

B. The Ninth Circuit Decision Also Conflicts With Those of Other Circuits, None of Which Treats Innocence Claims as Cognizable in Noncapital Federal Habeas Proceedings

The State has not found another federal appellate court decision granting an evidentiary hearing on a noncapital habeas applicant's freestanding claim of innocence. On the contrary, they prohibit it. As noted, the Ninth Circuit itself has disavowed the cognizability of such claims in noncapital cases. *Coley* v. *Gonzales*, 55 F.3d at 1387 ("Coley seems to be making the claim that he is factually innocent—but that

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4. The fact that respondent's state habeas petitions were denied does not suggest the state court acted arbitrarily or violated procedural due process. The California Supreme Court permitted respondent to present his actual innocence claim, and denied relief because respondent's showing was insufficient.

claim alone is not reviewable on habeas," citing *Herrera*). Nor, so far as the State can determine, have other circuits found such claims cognizable after *Herrera*. See *David* v. *Hall*, 318 F.3d 343, 347-48 (1st Cir. 2003) ("The actual innocence rubric . . . has been firmly disallowed by the Supreme Court as an independent ground of habeas relief, save (possibly) in extraordinary circumstances in a capital case."); *Fielder* v. *Varner*, 379 F.3d 113, 122 (3d Cir. 2004) (sole timely claim of innocence based on newly discovered evidence was properly dismissed as not cognizable); *Rouse* v. *Lee*, 339 F.3d 238, 255 (4th Cir. 2003) (en banc) ("claims of actual innocence are not grounds for habeas relief even in a capital case"); *Foster* v. *Quarterman*, 466 F.3d 359, 367 (5th Cir. 2006) ("actual-innocence is *not* an independently cognizable federal-habeas claim" in capital case); *Zuern* v. *Tate*, 336 F.3d 478, 482 n.1 (6th Cir. 2003) (no freestanding actual innocence claim in capital case); *Johnson* v. *Bett*, 349 F.3d 1030, 1038 (7th Cir. 2003) ("For claims based on newly discovered evidence to state a ground for federal habeas relief, they must relate to a constitutional violation independent of any claim of innocence."); *Burton* v. *Dormire*, 295 F.3d 839 (8th Cir. 2002) ("we have squarely rejected the notion that a prisoner may receive a writ simply because he claims he is innocent"); *LaFevers* v. *Gibson*, 238 F.3d 1263, 1265 n.4 (10th Cir. 2001) ("an assertion of actual innocence, although operating as a potential pathway for reaching otherwise defaulted constitutional claims, does not, standing alone, support the granting of the writ of habeas corpus"); *Brownlee* v. *Haley*, 306 F.3d 1043, 1065 (11th Cir. 2002) (no freestanding actual innocence claim in capital case).

Here, the Ninth Circuit took the extraordinary step of recognizing and directing an evidentiary hearing on a new species of federal habeas claim via an uncertified appellate issue without full briefing or consideration of the significant policy considerations at issue. The result contravenes this Court's habeas jurisprudence, as well as the national consensus interpreting *Herrera*. While the panel's order is unpublished, it undoubtedly will be cited to authorize federal courts within the Ninth Circuit to consider freestanding

actual innocence claims in noncapital cases. See Fed. R. App. P. 32.1(a) (permitting citation of unpublished federal decisions issued on or after January 1, 2007); Ninth Circuit Rule 36-3(b); see also *Herrera*, 506 U.S. at 428 (Scalia, J., concurring) (expressing concern that, by deciding case only by assuming arguendo that actual innocence claim is cognizable, the lower federal courts will face newly-discovered-evidence-of-innocence claims, "in which event such federal claims, it can confidently be predicted, will become routine and even repetitive"). It is untenable to subject long final criminal judgments in the nine States and two Territories within the Ninth Circuit to federal retrials, while the rest of the country properly entrusts the question of guilt to state trial, habeas corpus, and clemency procedures that are more than adequate to ensure against conviction of the innocent.

C. The Ninth Circuit Ignored This Court's Requirement That The Showing Necessary For Obtaining An Evidentiary Hearing On An Innocence Claim Must Be "Extraordinarily High"

1. The Ninth Circuit held that respondent was entitled to an evidentiary hearing by meeting only a "reasonably low threshold" showing of "a colorable claim for relief and the lack of a factual finding below." (App. 3a.) That was error. This Court in *Herrera* explained that, "because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high," and the evidence would have to be "truly persuasive." 506 U.S. at 417. In *Schlup* v. *Delo*, 513 U.S. at 317, this Court added that a "*Herrera*-type claim would have to fail unless the federal habeas court is itself convinced that those new facts unquestionably establish [defendant's] innocence." Most recently, in *House* v. *Bell*,

126 S. Ct. 2064, 2087, 126 L. Ed. 2d 1 (2006), this Court held that a habeas applicant's showing to overcome a procedural default—that more likely than not no reasonable juror would have convicted in light of the new evidence—did not suffice for a freestanding innocence claim.

The Ninth Circuit's approach disregards these holdings, which collectively make clear that a freestanding actual innocence claim may proceed in federal court, if at all, only on the most compelling of factual showings. Otherwise, innumerable claims of actual innocence will satisfy a "reasonably low threshold" and necessitate evidentiary hearings. Justice O'Connor's warning in *Herrera* appears to have been directed against precisely the kind of unacceptable result mandated by the Ninth Circuit in this case. *Herrera*, 506 U.S. at 426 (O'Connor, J., concurring) ("Unless federal proceedings and relief—if they are to be had at all—are reserved for 'extraordinarily high' and 'truly persuasive demonstration[s] of "actual innocence"' that cannot be presented to state authorities, *ante*, at 417, the federal court will be deluged with frivolous claims of actual innocence.").

2. Further, the Ninth Circuit erroneously failed to evaluate the reliability or probative force of the proffered evidence of innocence, or to consider the evidence of respondent's guilt. The Ninth Circuit simply made the uncritical observation that, "[i]f truthful," the testimony of Jeffrey Taggart and Charles Austin at the Brewer trial would prove that respondent is not guilty of first degree murder. *Schlup* v. *Delo*, 513 U.S. 298, exposes the Ninth Circuit's error.

Schlup concerned a habeas applicant's effort to overcome a procedural default by seeking an evidentiary hearing to show factual innocence. Comity and federal-state relations are placed less intensely in issue by factual innocence claims in a gateway case like *Schlup* than when the applicant seeks outright habeas relief on such claims. Yet, even in the gateway context, *Schlup* clearly rejected the notion that new evidence should be tested under a summary judgment standard, where the court determines only whether there is a genuine issue of fact. *Id.* at 331-32. Instead, the federal

habeas court "must assess the probative force of the newly presented evidence in connection with the evidence of guilt adduced at trial." *Id.* at 332; *Herrera*, 506 U.S. at 418 ("the affidavits must be considered in light of the proof of petitioner's guilt at trial"). In making this initial assessment, the court "may consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence." *Schlup*, 513 U.S. at 332. The type of newly discovered evidence that may amount to an "extraordinarily high" showing of innocence includes "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." *Id.* at 324. "In short, the new evidence is not simply taken at face value." *House* v. *Bell*, 126 S. Ct. at 2088 (Roberts, C.J., concurring and dissenting).

Similarly, in denying relief without an evidentiary hearing, this Court in *Herrera* judged that the affidavits in support of the innocence claim lacked reliability and were inconsistent, while the proof of guilt at the state trial, including the petitioner's own statements, was compelling. *Herrera*, 506 U.S. at 417-18. Circuit courts engage in the same process in rejecting freestanding innocence claims without a hearing. See, *e.g.*, *Cress* v. *Palmer*, 484 F.3d 844, 855 (6th Cir. 2007) ("the new evidence proffered in this case simply cannot satisfy the hypothetical *Herrera* [extraordinarily high] standard."); *In re Brown*, 457 F.3d 392, 396 (5th Cir. 2006) ("Brown's evidence falls far short of any such [extraordinarily high] threshold."); *Stafford* v. *Saffle*, 34 F.3d 1557, 1561 (10th Cir. 1994) ("if we similarly assume such a right, Stafford's asserted 'newly-discovered evidence' falls considerably short of the 'extraordinarily high' showing of actual innocence that would be required.").

Here, however, the Ninth Circuit failed to consider the patent unreliability of the testimony of Jeffrey Taggart and Charles Austin at the Brewer trial. Jeffrey Taggart, respondent's brother, gave inconsistent accounts of the killing at his interview with the police, respondent's trial, and Brewer's trial. Jeffrey's explanation for allegedly lying to police was unsatisfactory: he claimed the police yelled at

him, cursed, threatened to charge him with murder, and threw their guns on the table during the interview, but the tape of that interview reveals no such intimidation. In addition, it defies belief that Brewer and Oden were driving by Cedric Turner—the person respondent had hired Brewer to kill—when Oden independently and spontaneously shot Johnson instead, because Johnson was "talking too much."

Likewise palpably insufficient is the testimony of respondent's former jailhouse companion, Charles Austin, who claimed he saw the passenger in the car fire the shots. Even if not otherwise suspicious, Austin's testimony was, at best, generic. He could not describe the persons or objects he claimed to have seen. Further, his testimony was inconsistent with Jeffrey Taggart's version of events, as Austin said Jeffrey was *not* present. See *Herrera*, 506 U.S. at 418 ("the affidavits themselves contain inconsistencies, and therefore fail to provide a convincing account of what took place").

Nor is respondent's own post-trial declaration compelling. Respondent disavowed hiring Brewer to kill Turner, indicated he was surprised when shots were fired, and claimed he thought he himself might have been the intended target because of an ongoing feud with another family in the neighborhood. He also claimed he told police what they wanted to hear because he was sure he had not done anything wrong, which utterly failed to explain his statements that he offered Brewer $50 to shoot Turner, and that Brewer "killed the wrong guy." See *Herrera*, 506 U.S. at 424 (O'Connor, J., concurring) ("petitioner offers no plausible excuse for the most damaging piece of evidence," a letter in which he implicitly admitted responsibility for one of the murders).

Moreover, the proffered evidence of innocence in *Herrera* was stronger than that presented by respondent, yet still did not suffice to warrant an evidentiary hearing. In *Herrera*, the defendant asserted that his deceased brother had committed the murder, through affidavits from the brother's son who said he had witnessed the killing, and from an attorney, a family friend, and an inmate who stated the

brother confessed to the killing. A fortiori, if that showing did not merit further examination, respondent's does not.

Accordingly, neither Charles Austin, Jeffrey Taggart, nor respondent provided "trustworthy eyewitness accounts" amounting to "truly persuasive" evidence of respondent's actual innocence. And the sheer possibility that the Brewer trial jury might not have decided whether Brewer or Oden was the actual shooter, and therefore did not find that Brewer personally used a gun in Johnson's murder, detracts little or not at all from the verdict in respondent's trial. See *Bradshaw* v. *Stumpf*, 545 U.S. at 191 (Thomas, concurring). No jury necessarily rejected Brewer as an accomplice to respondent's murder-for-hire scheme, let alone determined that Johnson was killed independently of that scheme.

The Ninth Circuit also failed to assess the probative value of the Brewer trial evidence against the evidence of guilt adduced at respondent's trial. In particular, the Ninth Circuit ignored the fact that respondent admitted his involvement in the murder. As noted, in respondent's taped police interview he said he offered Brewer $50 to shoot Turner, and also stated, "I hired Lee Brewer to kill Cedric Turner. He killed the wrong guy." Also, when Brewer went to respondent's house the next day to get paid and said he had taken care of it, respondent informed him that he killed the wrong man and that the fee would be reduced. This evidence strongly supports a conclusion that Brewer accidentally killed Johnson instead of Turner. Respondent's liability for first degree murder is clear.

In sum, in light of all the circumstances, respondent has not met the "extraordinarily high" showing that would justify a hearing on his freestanding actual innocence claim. "If the federal courts are to entertain claims of actual innocence, their attention, efforts, and energy must be reserved for the truly extraordinary case; they ought not be forced to sort through the insubstantial and the incredible as well." *Id.* at 426-27 (O'Connor, J., concurring).

Finally, an evidentiary hearing conducted on respondent's actual innocence claim would be extremely disruptive, highly burdensome, and unlikely to result in a more reliable

determination than the one reached by respondent's jury 21 years ago. See *Herrera*, 506 U.S. at 403-04 ("the passage of time only diminishes the reliability of criminal adjudications"). The State would have to expend significant resources to reinvestigate the killing, locate any witnesses who might still be available to testify, and litigate anew respondent's factual guilt of first degree murder. Certiorari should be granted to stem the inevitable tide of evidentiary hearings on freestanding actual innocence claims that will result from the Ninth Circuit's unprecedented and unwarranted order in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: August 13, 2007

Respectfully submitted,

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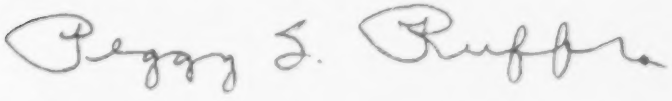

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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

CHARLES D. MARSHALL, WARDEN, *Petitioner,*

v.

ROBERT HENRY, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX INDEX

	Page
Memorandum Opinion by Ninth Circuit Court of Appeals, filed March 12, 2007	1a
Order Denying Rehearing and Rehearing En Banc by Ninth Circuit Court of Appeals, filed May 16, 2007	5a
Tentative Order Denying Petition For Writ Of Habeas Corpus by United States District Court for the Eastern District of California, filed January 25, 2005	6a
Opinion Affirming Judgment of Conviction by California Court of Appeal, filed September 21, 1988	23a
Docket, Case No. S056606, Showing Denial of Petition for Writ of Habeas Corpus by California Supreme Court, filed January 28, 1997	56a
Order Denying Writ of Habeas Corpus by California Supreme Court, Case No. S010192, filed June 8, 1989	57a
Docket, Case No. S007648, Showing Denial of Petition for Review by California Supreme Court, filed December 22, 1988	58a

IN THE SUPREME COURT OF THE UNITED STATES

No.

CHARLES D. MARSHALL, WARDEN, *Petitioner,*

v.

ROBERT HENRY, *Respondent.*

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT HENRY,	)	No. 05-16947
	)	
Petitioner - Appellant,	)	D.C. No. CV-94-00916-JKS
	)	
v.	)	MEMORANDUM*
	)	
CHARLES D. MARSHALL,	)	
	)	
Respondent - Appellee.	)	
	)	

Appeal from the United States District Court
for the Eastern District of California
James K. Singleton, Chief District Judge, Presiding

Argued and Submitted December 4, 2006
San Francisco, California
Filed March 12, 2007

Before: NOONAN, HAWKINS, and THOMAS, Circuit Judges.

Robert Henry appeals the district court's denial of his petition for habeas corpus. We affirm as to the issue of his *Doyle* rights[1] but remand to the district court for an evidentiary hearing on the uncertified issue of actual innocence. Because the parties are familiar with facts and the procedural history, we will not recount it here.

I

The substantive provisions of AEDPA do not apply to this case. *Phillips v. Woodford*, 267 F.3d 966, 973 (9th Cir. 2001). Under pre-AEDPA habeas review, we presume the correctness of state court factual findings unless the record does not support the findings, or unless other defects, not at issue here, are present. 28 U.S.C. § 2254(d); *Kuhlmann v. Wilson*, 477 U.S. 436, 459-60 (1986); *McKenzie v. Risley*, 842 F.2d 1525, 1531 (9th Cir. 1988) (en banc). Under pre-AEDPA law, we review questions of law and mixed questions of law and fact *de novo*, owing no deference to a state court's legal conclusions. *Williams v. Taylor*, 529 U.S. 362, 400 (2000) (O'Connor, J., concurring) (explaining pre-AEDPA standard of review).

II

Henry's voluntary statements to Officer Bawart waived his right to remain silent. *United States v. Pino-Noriega*, 189 F.3d 1089, 1098 (9th Cir. 1999); *United States v. Ochoa-Sanchez*, 676 F.2d 1283, 1286 (9th Cir. 1982). As in *Pino-Noriega*, there "is nothing in the record to indicate that [Henry's] momentary silence was intended to be a reinvocation of his rights." *Pino-Noriega*, 189 F.3d at 1098. *See also United States v. Lorenzo*,

---

1. *Doyle v. Ohio*, 426 U.S. 610 (1976).

570 F.2d 294, 298 (9th Cir. 1978). Moreover, because Henry's statement about the agreed-upon price, and silence as to the contract's purpose, were "arguably inconsistent" with his defense asserted at trial, they may be used to question that defense. *United States v. Makhlouta*, 790 F.2d 1400, 1404 (9th Cir. 1986). *See also United States v. Hoac*, 990 F.2d 1099, 1103-04 (9th Cir. 1993) (defendant's failure to state at arrest that he was an "innocent dupe" was "arguably inconsistent" with the defense presented by his attorney at trial). As a result, Henry's due process rights were not violated by the prosecutor's statements or the jury instruction.

III

Ninth Circuit Rule 22-1(e) permits habeas petitioners to brief uncertified issues using separate headings distinguishing the certified from the uncertified issues. *Schardt v. Payne*, 414 F.3d 1025, 1032 (9th Cir. 2005). "Under this rule, we construe such briefing as a request for an expanded COA," *id.*, and we may grant the COA if the petitioner has made a substantial showing of the denial of a constitutional right. *Hivala v. Wood*, 195 F.3d 1098, 1104 (9th Cir. 1999). We do so here with regard to Henry's actual innocence claim, but decline to grant a COA to Henry's sufficiency of the evidence claim.

Henry seeks an evidentiary hearing on his actual innocence claim. Habeas petitioners must meet "a reasonably low threshold" in order to receive an evidentiary hearing, showing only a colorable claim for relief and the lack of a factual finding below. *Phillips v. Woodford*, 267 F.3d 966, 973 (9th Cir. 2001). Here there is no evidence in the record that Henry received an evidentiary hearing in state court to allow the state court to find facts relevant to the newly-discovered evidence. Henry is entitled to an evidentiary hearing in the district court because if the newly-discovered evidence proves to be true, he would have made out a valid freestanding claim of actual innocence by "affirmatively prov[ing] that he is probably innocent." *Carriger*

v. Stewart, 132 F.3d 463, 476 (9th Cir. 1997); *Herrera v. Collins*, 506 U.S. 390, 417-19 (1993). If truthful, the testimony of Jeffrey Taggart and Charles Austin would prove that Henry, while possibly guilty of solicitation, conspiracy, and attempt for hiring a hit man, is not guilty of first degree murder. We therefore remand to the district court to hold an evidentiary hearing. Each party shall bear its own costs on appeal.

AFFIRMED IN PART AND REVERSED IN PART. REMANDED.

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*This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir.R. 36-3.

Filed May 16, 2007

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT HENRY,	) No. 05-16947
	)
Petitioner - Appellant,	) D.C. No. CV-94-00916-JKS
	)
v.	) ORDER
	)
CHARLES D. MARSHALL,	)
	)
Respondent - Appellee.	)
	)

Before: NOONAN, HAWKINS, and THOMAS, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Filed 01/25/2005

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT HENRY	) Case No. CIV-S-94-0916 (JKS)
	)
Petitioner	) TENTATIVE ORDER
	)
vs.	)
	)
CHARLES D. MARSHALL,	)
	)
Respondent.	)
	)

Robert Henry was convicted in California state court of first-degree murder with special circumstances and sentenced to life imprisonment without the possibility of parole. He exhausted his state judicial remedies and brings this action in federal habeas corpus. 28 U.S.C § 2254. The Court has carefully considered the record and, finding no constitutional error, will deny the petition for habeas corpus.

BACKGROUND

The following facts are taken from the opinion of the California Court of Appeal. The State's theory of the case was that Robert Henry hired Francis Lee Brewer to kill Cedric Turner, whom Henry believed had engineered a robbery of Henry. In attempting to carry out his contract to kill Turner, Brewer mistakenly shot and killed Andre Johnson. The prosecution therefore proceeded on a theory of transferred intent.

Following the robbery of Henry, Henry and two relatives, Jeffrey Taggert and Jester Taggert, met at Henry's house to discuss retaliation. After Henry recounted his tale of having been robbed at gunpoint, the three decided to shoot Turner. In order to carry out the plan, Henry met with Bernard Oden and Oden's friend Brewer. At the meeting, Henry told Brewer that Turner had robbed him of $400 and offered Brewer two "Hubbas" (slang for crack cocaine) to give Turner "a good ass whipping." According to the Court of Appeal, Brewer fully understood the true meaning of appellant's request, i.e., to kill Turner. Brewer immediately went to his girlfriend's house to pick up a .22 caliber sawed-off rifle and ammunition, loaded the gun, placed it in the blue plymouth he had stolen earlier, and drove to Gateway Drive, the prearranged place for the shooting.

At 6:00 p.m. Henry and a relative accosted Turner on Gateway Drive and told Turner that they were going "to take him out," and that he "was gonna die." Henry and his relative then left to meet a second relative and then the three all armed with guns returned to Gateway Drive. Henry confronted Turner a second time, repeating his threat that Turner was going to die. Turner retreated to a nearby driveway. One of Henry's relatives, in Henry's presence, warned the gathering crowd to disperse because "somebody's going to get shot."

Turner fled into a nearby house where he met Andre Johnson. Johnson persuaded Turner to leave saying, "come on, we'll handle it." Johnson offered Turner a ride to Turner's home, and Turner accepted. They left the residence together. Turner entered Johnson's vehicle and sat in the front passenger sear. In the meantime, Johnson and Henry engaged in a shouting match and began to pushing each other. Johnson deprecated Henry's coiffure.

Meanwhile, Brewer and Oden arrived at the scene in the blue plymouth and parked in front of Johnson's car. Brewer got out of the car and stood on the sidewalk observing the argument between Henry and Johnson. Henry walked up to Brewer and pointed out Turner to him saying, "that is the guy."

Thereafter, Brewer, with Oden sitting in the front passenger seat, drove down the street, made a U-turn, and stopped in the middle of the street next to Johnson's car. As one of Henry's relatives shouted "watch out, he is gonna shoot," Brewer leaned across Oden and fired numerous shots out of the passenger window of the car, hitting and killing Johnson who was standing approximately 5 to 10 feet away. In the view of the appellate court, the evidence overwhelmingly demonstrates that at the time of the shooting, Johnson was reaching for the door of his automobile and was facing toward the crowd in the street rather than toward the car from which the shots were coming.

After the shooting, Brewer disposed of the murder weapon, wiped the fingerprints off the blue plymouth, and abandoned the car. Then, accompanied by Oden, he returned to the crime scene to ascertain if the victim had been shot. As a next step, Brewer, Oden, and a third man went to Henry's house on Sawyer street. Brewer and Henry discussed the shooting and Brewer assured Henry that he did not have to worry anymore because he (Brewer) had taken care of the job. Henry told Brewer that he was willing to pay him, but wished to negotiate the price because the wrong person was shot. They agreed that the price would be reduced from $200 to $100. The Court of Appeal found this version of the facts corroborated by Henry's statements to Detective Bawart after Henry's arrest that he, "hired Lee Brewer to kill Cedric Turner. He killed the wrong guy. I can't understand why I am being charged."

SCOPE OF REVIEW

Henry filed his original petition for habeas corpus in federal court on June 2, 1994. Thereafter, he amended his petition on May 20, 1996. The Anti-Terrorism and Effective Death Penalty Act (AEDPA) was enacted on April 24, 1996. A petition filed in district court on or before April 24, 1996, is controlled by pre-AEDPA law. See *Lindh v. Murphy*, 521 U.S. 320 (1997). This is true even when a habeas petition is amended after April

24, 1996. *See Phillips v. Woodford*, 267 F.3d 966, 973 (9th Cir. 2001) (treating amended petition filed after AEDPA's enactment as part of earlier, pre-AEDPA petition and applying pre-AEDPA law); *Keating v. Hood*, 191 F.3d 1053, 1060-61 & n. 7 (9th Cir. 1999) (finding that where petitioner originally filed pre-AEDPA and then amended the petition post AEDPA, pre-AEDPA law governed), *cert. denied*, 531 U.S. 824 (2000), *overruled on other grounds by Payton v. Woodford*, 346 F.3d 1204 (9th Cir. 2003); *Fuller v. Johnson*, 158 F.3d 903, 905 (5th Cir. 1998) *cert. denied*, 526 U.S. 1133 (1999); *Johnson v. United States*, 196 F.3d 802, 805-06 (7th Cir. 1999). Under pre-AEDPA law, a federal habeas court is "limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 68 (1991).

DISCUSSION

This matter was referred to a United States Magistrate Judge. The magistrate filed findings and recommendations, which Judge Damrell adopted. Docket No. 73. These determinations became the law of the case, which this Court may only modify if there has been, (1) an intervening change in the law; (2) an intervening change in the facts; or (3) an intervening determination that the earlier decision was inconsistent with controlling authority from the Untied States Supreme Court or the Ninth Circuit Court of Appeals that existed at the time, but that was overlooked by court and counsel. *See Delta Savings Bank v. United States*, 265 F.3d 1017, 1027 (9th Cir. 2001), *cert. denied sub nom., Kim v. United States*, 534 U.S. 1082 (2002). A number of years have passed since Judge Damrell adopted the magistrate's findings and recommendations. During that time the law has evolved in some significant areas. Where it has evolved, the change in the law will be referenced in the following decision.

Henry advances four claims. First, he argues that the

evidence presented at the trial of Brewer, subsequent to his own trial, resulted in an inconsistent verdict, entitling him to a new trial. Second, Henry asserts that his Fifth Amendment rights were violated by the prosecutor when the prosecutor pointed out at trial that Henry had not denied involvement in his statement to the police and procured a jury instruction on adoptive admissions from silence in the face of accusations. Next, he contends that there was insufficient evidence to prove that he hired Brewer to kill Turner, rather than just to assault him. Finally, Henry submits that he was prejudiced when the prosecutor misstated the evidence. These arguments will be addressed in turn.

I. Evidence Presented At Brewer's Subsequent Trial

Three men were tried as accomplices in the murder of Johnson. Henry was tried first, on the theory that he had hired Brewer to kill Turner, and that Brewer had fired at Turner and killed Johnson in error. The jury accepted this theory, and convicted Henry of first-degree murder. The trial judge found the special circumstances of murder for profit and use of a firearm. Taggert, Henry's cousin, went to trial ten days later and was convicted of second-degree murder for which he received an eight year prison sentence. Two years later Brewer was tried. It appears that Brewer was tried on the same theory that the prosecution followed in trying Henry—that Brewer was hired by Henry to kill Turner, but mistakenly killed Johnson. The jury found Brewer guilty of second- degree murder and specifically rejected enhancements for personal use of a firearm and a financial motive. Henry interprets the evidence at Brewer's trial as establishing that Oden, not Brewer, was the shooter. He argues that Oden had no involvement in any murder for hire and that the shooting of Johnson therefore was unrelated to any quarrel between Henry and Turner. Henry points out that the second jury's failure to find either a firearm enhancement or a financial motive is new evidence that at least

raises a reasonable doubt regarding his culpability.

Henry contends that two decisions of the United States Supreme Court, *Herrera v. Collins*, 506 U.S. 390 (1993), and *Schlup v. Delo*, 513 U.S. 298 (1995), allow a federal court in habeas to entertain an untimely motion for new trial based on newly discovered evidence, i.e., a stand alone claim of "actual innocence" based on newly discovered evidence. Both of the cases Henry points to are capital cases. In Henry's case, the prosecutor made it clear from the outset that the death penalty would not be sought. Henry argues, however, that it is unreasonable to permit federal review where the penalty is death, and deny it where the penalty is life imprisonment without the possibility of parole. He notes that he was 19 years old at the time of his conviction and of limited intelligence. For purposes of this case the Court will assume that the *Herrera/Schlup* rules apply to non-capital cases. *See, e.g., Sistrunk v. Armenakis*, 292 F.3d 669, 673 n. 3 (9th Cir. 2002) (assuming *arguendo* that *Schlup* applies to non-capital cases).

Schlup addresses a claim of actual innocence as a predicate for asserting a defaulted constitutional claim in a successive or abuse habeas petition. A *Schlup* actual innocence claim is procedural—a means of obtaining the court's attention to a defaulted claim where the petitioner cannot show cause plus prejudice and excuse the default. *See McCleskey v. Zant*, 499 U.S. 467, 487 (1991). A majority of the Court in *Schlup* concluded that a sufficient showing of actual innocence could substitute for a showing of cause plus prejudice, and excuse a prior procedural default allowing a federal court to consider a second habeas petition. The *Schlup* Court then addressed the showing that a petitioner would have to meet in order to pass through this procedural "gateway" and obtain consideration of his defaulted constitutional claims. In *Schlup* the Court considered whether the petitioner's burden of proof was the one established in *Sawyer v. Whitley*, 505 U.S. 333 (1992), or that announced in *Murray v. Carrier*, 477 U.S. 478 (1986). In *Sawyer*, the Court found that it must be shown by clear and

convincing evidence that but for a constitutional error no reasonable juror would have found the petitioner eligible for the death penalty. In *Murray*, the Court established that a petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the newly discovered evidence. The *Schlup* Court distinguished a third standard articulated in *Jackson v. Virginia*, 443 U.S. 307 (1979) (questioning whether, in light of the evidence, any rational juror could have found the defendant guilty beyond reasonable doubt). Under the *Schlup* standard, a federal trial judge must consider the credibility of witnesses who testified at trial and whose affidavits provide the alleged newly discovered evidence. In contrast under the *Jackson* standard the reviewing court does not make credibility determinations. Further, under *Jackson* the focus is on the whether the jury "could" find guilt beyond reasonable doubt. Under *Carrier*, the use of the word "would" focuses the inquiry on the likely behavior of a hypothetical trier of fact. Under both *Sawyer* and *Carrier* the Court concluded that a petitioner's showing of innocence is not insufficient solely because the trial record contained sufficient evidence to support a jury's verdict. *Schlup*, 513 U.S. at 331-32.

In contrast to *Schlup*, *Herrera* presents a substantive, or stand-alone claim. The claim is considered independently and not a justification for excusing prior procedural defaults. The petitioner does not claim innocence in order to avoid a procedural default so that he may argue separate constitutional claims. Rather, he seeks relief solely on the basis of his claim of innocence. While the precise standard has not been developed to the point that the *Schlup* standard has, it is clear that the hurdle a petitioner must cross is much higher than that required to avoid a procedural default. The Ninth Circuit has interpreted *Herrera* as requiring a petitioner to affirmatively prove his innocence---not just raise doubts about his guilt in order to prevail on a stand-alone claim. *Carriger v. Stewart*, 132 F.3d 463, 476-77 (9th Cir. 1997) (en banc), *cert. denied*, 537 U.S. 1133 (1998).

In this case Henry has four claims, but none of them was procedurally defaulted. He thus does not need to pass through the *Schlup* gateway to assert any of his claims. Consequently, his actual innocence claim must be viewed under the *Herrera/Carriger* standard. It is clear that Henry cannot meet that standard. His admission to officer Bawart is fatal to this claim. Bawart testified that Henry told him, "I hired Lee Brewer to kill Cedric Turner. He killed the wrong guy. I can't understand why I am being charged." Henry seeks to avoid this result by arguing that Bawart is hard of hearing, that Henry is soft spoken, and that what Henry really said was, "[i]f I had hired Francis Brewer to kill Cedric Turner, and he got the wrong guy, I don't know why I am being charged." Docket No. 39, Ex. B at 5 (Decl. of Henry). Unfortunately for Henry, his after the fact explanation is not worthy of belief. Henry's recorded interview was presented to the jury to corroborate Bawart's testimony regarding Henry's admissions. *See Doe v. Menefee*, 391 F.3d 147, 164-65 (2d Cir. 2004) (reversing a district court's finding that testimony of the defendant and other witnesses constituted reliable evidence of actual innocence as clearly erroneous in light of the defendant's prior statements and admissions). Henry has not affirmatively proved that it is more probable than not that he was not an accomplice to the murder of Johnson under the theory of transferred intent. The belated testimony of Taggert, Henry's brother, and Charles Austin, a convicted felon, do not persuade the Court that Henry is probably innocent.

The State correctly points to a number of cases in which the Supreme Court and the Ninth Circuit have held that inconsistency between verdicts does not create due process problems. *See, e.g., United States v. Powell*, 469 U.S. 57 (1984); *Dunn v. United States*, 284 U.S. 390 (1932); *United States v. Hart*, 963 F.2d 1278 (9th Cir. 1992). Since Henry was tried first, there are no collateral estoppel or res judicata problems from any inconsistent findings by the jury that tried Brewer two years later. *See, e.g., Ashe v. Swenson*, 397 U.S.

436 (1970) (discussing possible res judicata effects of inconsistent verdicts). It is true that some courts have distinguished *Powell* by shifting attention from the verdicts reached by sequential juries, and the prosecutor's knowledge and intent in trying more than one person for acts against a single victim. These cases appear related to decisions that invoke judicial estoppel to prevent a litigant from arguing one theory to a forum and obtaining a favorable result and then arguing an inconsistent theory to an alternate forum. *See, e.g., Russell v. Rolfs*, 893 F.2d 1033, 1036-37 (9th Cir. 1990).

A number of courts have found a due process error cognizable in federal habeas corpus where a state prosecutor uses inconsistent theories, arguments, and evidence to prosecute co-defendants in separate trials for the same crime. *See, e.g., Jacobs v. Scott*, 513 U.S. 1067 (1995) (Mem.) (Stevens and Ginsburg, JJ, dissenting from denial of certiorari); *Nguyen v. Lindsey*, 232 F.3d 1236 (9th Cir. 2000); *Shaw v. Terhune*, 353 F.3d 697 (9th Cir. 2003), *opinion amended and superceded by* 380 F.3d 473 (9th Cir. 2004). There is support for this proposition in other circuits as well. *See, e.g., Stumpf v. Mitchell*, 367 F.3d 594 (6th Cir. 2004) *cert. granted*, 2005 WL 32977 (U.S. January 7, 2005); *Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000). There is also opposing authority. *See Nichols v. Scott*, 69 F.3d 1255 (5th Cir. 1995); *Jacobs v. Scott*, 31 F.3d 1319 (5th Cir. 1994); *see also United States v. Paul*, 217 F.3d 989, 998-99 (8th Cir. 2000) (precluding inconsistent evidence but allowing inconsistent arguments or theories).

Nguyen and *Shaw* are post-AEDPA cases that provide little support for Henry. The prosecutor tried first. The theory of transferred intent was the same in both cases and the same enhancements were argued. The evidence presented by the prosecutor was essentially the same, though new witnesses were called by the defense. If there is inconsistency it is in the respective jury verdicts, not in the prosecution's theory of the case. Under the circumstances there was no due process violation or was there a proper basis for invoking judicial

estoppel.

II. Adoptive Admissions From Silence In The Face Of Accusations And the Right To Remain Silent

It does not appear that Henry objected at trial to the prosecutor's statements in argument. Nor does it appear that Henry objected to the jury instruction on adoptive admissions that he challenges in this proceeding. Had this matter occurred in federal court, Henry would need to show plain error in order to prevail.

Henry did not testify at his trial. During the course of the trial, a detailed statement from Henry in the form of questions put to him by police officers and his answers was presented to the jury. The statement was in large part recorded and a transcript was prepared. In addition to the recorded statement, Officer Bawart testified that after the tape recorder was turned off, and Henry was informed that he was going to be booked for murder, Henry remarked, "I hired Lee Brewer to kill Cedric Turner. He killed the wrong guy. I can't understand why I'm being charged." Vol. III, Ex. B, Part 2 at 405. Officer Ronald Becker, who was also present, confirmed this testimony in part. He testified that Henry said, "He couldn't under stand why he was going to jail for murder because the guy he had hired had shot the wrong person." In closing argument defense counsel stressed that the alleged admission did not occur during the part of the interrogation that was recorded and argued that Becker's recollection was probably more accurate than Bawart's because Bawart was hard of hearing and his notes, which quoted the statement, referred to it as similar to what Henry said and not almost verbatim, as Bawart had testified at trial. Defense counsel tried to persuade the jury that what Henry had really meant, consistent with the defense theory of the case, was that he had hired Brewer to beat up Turner, and Brewer (or Oden) had shot Johnson. In his final rebuttal argument the prosecutor addressed this issue as follows:

> Last but not least, of course, is the Defendant's statement. You've got it on tape, and I want you to listen to it. I won't tell you everything about it, but there's things the court will tell you.
> One of those things is, if you are confronted with the facts that you have committed a crime, and you sit there and don't say, "Hey, I didn't do it" you can take that into consideration; if you sit there and kind of mealy-mouth around and don't really answer questions and this number (demonstrating) all that can be taken into account in deciding whether or not how much emphasis you'll place on that particular statement that he gives the police, and whether or not there's a confession of guilt, whether or not when you run away to Richmond to leave the scene that's consciousness of guilt. That is up to you.

Id. at 516. The prosecutor then referred to the following portion of the recorded interrogation:

> Bawart: so you offered him $200 to shoot Ced?
> Henry: No.
> Bawart: That's a lie.
> Henry: I didn't offer hm $200.
> Bawart: How much did you offer him?
> Henry: I offered him $50.

Id. at 517. After referring to this portion of the tape, the prosecutor continued:

> Well Ladies and Gentlemen, when you listen to that tape, its there, and I want you to listen to it. He's not upset over the fact the officer is saying 'You hired this man to shoot somebody.' He's upset because he didn't offer him $200, he offered him $50. . . . [U]se common sense. If you were in that situation, you're being accused of a crime, you're being accused of murdering somebody or being involved

> in murdering somebody, wouldn't you say, "Hey, I didn't contract to shoot him," or would you be worried about how much you were going to pay him unless you had this contract and you were going to pay him. . . . I'll tell you this, basically. The defense argument is, ignore what the defendant told the police. He attacks Detective Becker and Bawart, saying they didn't write in their report the argument over "similar" or "verbatim." You heard the detective's testimony. You have seen what was read in the report. He made the statement which was similar to, "I hired Lee Brewer to kill Mr. Turner. He killed the wrong guy. I can't understand why I am being charged." The defense attorney wants you to ignore that tape and statement. I submit to you, that statement alone is enough to convict the Defendant as charged.

Id. at 518.

Shortly thereafter the jury was carefully instructed regarding alleged confessions and admissions by Henry and that it could consider an inference of consciousness of guilt from flight in order to avoid prosecution. *Id.* at 528. Among the instructions was the following:

> If you should find from the evidence that there was an occasion when the Defendant, under conditions which reasonably afforded him an opportunity to reply, failed to make a denial or made false, evasive, or contradictory statements in the face of an accusation expressly directed to him or in his presence charging him with the crime for which he is now on trial or tending to connect him with its commission, and if you should find that he heard the accusation and understood its nature, the circumstances of his silence or conduct on that occasion may be considered against him as indicating an admission that the accusation thus made was true.
>
> Evidence of such an accusatory statement is not received

> for the purpose of proving its truth, but only as it supplies meaning to the silence and conduct of the accused in the fact of it; and unless you should find that his conduct at the time indicated an admission that the accusatory statement was true, you should entirely disregard the statement.

Id at 529.

Henry argues that the prosecutor's statement constituted a comment on Henry's decision to invoke his Fifth Amendment rights. The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The government may not burden this right by commenting before the jury on a defendant's election not to testify. *Griffin v. California*, 380 U.S. 609 (1965); *see also Mitchell v. United States*, 526 U.S. 314 (1999) (extending *Griffin* to sentencing). The Supreme Court has held that there is an implicit promise in the Miranda warnings that silence will not be used against a defendant and a defendant is denied due process when a prosecutor seeks to impeach a defendant's exculpatory story at trial with post-arrest, post-Miranda warning silence. *Doyle v. Ohio*, 426 U.S. 610 (1976). In *Doyle*, the Court reasoned that the Miranda warnings may have induced the defendant to remain silent. In the absence of Miranda warnings there can be no inducement. A prosecutor may rely on pre-arrest silence for impeachment, *Jenkins v. Anderson*, 447 U.S. 231, 238-39 (1980), and post-arrest pre-Miranda silence for impeachment, *fletcher v. Weir*, 455 U.S. 603, 607 (1982).

Jenkins and *Fletcher* are inapplicable to this case because Henry received Miranda warnings, apparently waived them, and gave a fairly complete statement. His case more closely resembles *Anderson v. Charles*, 447 U.S. 404 (1980). In *Anderson* the Supreme Court held that where Miranda warnings are given and waived, and a defendant makes a statement and then testifies to an arguably inconsistent version of the facts at trial, he may be impeached not only with what he said in his

post-Miranda statement but with what he failed to say. *See also United States v. Pino-Noriega*, 189 F.3d 1089 (9th Cir. 1999); *United States v. Hoac*, 990 F.2d 1099, 1004 (9th Cir. 1993); *United States v. Makhlouta*, 790 F.2d 1400, 1403 (9th Cir. 1986); *United States v. Ochoa-Sanchez*, 676 F.2d 1283, 1286 (9th Cir. 1982).

A fair reading of the prosecutor's rebuttal argument indicates that he was responding to defense counsel's attack on Bawart's testimony regarding Henry's admission. The prosecutor was also attempting to show that Henry's recorded answers to Bawart's questions corroborated Bawart's testimony regarding the alleged admission that was not recorded. It is true that a number of the cases permitting a prosecutor's use of omissions in a defendant's post-Miranda, post-arrest statements for impeachment involve situations where a defendant testifies to an inconsistent exculpatory story. The Ninth Circuit has expanded the exception to the *Doyle* rule to include cases like this one, where a defendant does not testify, but the defense presented by his attorney is inconsistent with the defendant's pretrial post Miranda statements. *Hoac*, 990 F.2d at 1104 (stating that the *Charles* exception to the *Doyle* rule applies even when a defendant does not testify at trial) (citing *Anderson v. Charles*, 447 U.S. 404 (1980) (per curium), and *Klepper v. United States*, 331 F.2d 694, 701 (9th Cir. 1964)). Here, the prosecutor did not impermissibly comment on Henry's exercise of his Fifth Amendment rights.

Henry points out that in addition to the prosecutor's rebuttal argument, the jury was instructed on admissions by silence, or adoptive admissions. The instruction is set out above. The final sentence of the instruction is problematical in a case where the alleged adoptive admissions occurred during interrogation by police officers. The final sentence reads, "if you should find that [Henry] heard the accusation and understood its nature, the circumstances of his silence and conduct on that occasion may be considered against him as indicating an admission that the accusation thus made was true."

Vol. III, Ex. B, Part 2 at 529.

It is arguable that the *Charles* exception to *Doyle* only applies where questions to the defendant are "not designed to draw meaning from silence, but to elicit an explanation for a prior inconsistent statement." *Charles*, 447 U.S. at 409. To use silence in response to interrogation as substantive evidence as the instruction suggests may put an impermissible burden on the exercise of constitutional rights. It is not necessary to pursue this issue further, however, for even if error occurred it was harmless beyond reasonable doubt. The only mention that the prosecutor made of the instruction was in conjunction with his argument tying Henry's recorded admissions to the alleged unrecorded admission to which Bawart testified. Any error in giving the adoptive admissions instructions did not have a substantial and injurious effect or influence on the jury's verdict. *See Brecht v. Abrahamson*, 507 U.S. 619 (1993).

III. Sufficiency Of The Evidence

Henry argues that while there was substantial evidence that he hired Brewer to assault Turner, there was no evidence that he paid Brewer to kill Turner. The evidence of Henry's contract with Brewer must be considered in context with Henry's admissions to the police. These admissions provide substantial evidence from which a reasonable jury could find guilt beyond reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307 (1979).

IV. Prejudicial Error

Henry argues that the prosecutor committed prejudicial error when he speculated that Henry and Brewer modified their agreement to substitute $200 for the quantity of cocaine originally promised in return for an assault on Turner. The comment did not draw an objection. Defense trial counsel obviously felt that the comment was within the range of the

evidence. *See United States v. Gray*, 876 F.2d 1411, 1417 (9th Cir. 1989) *cert. denied*, 495 U.S. 930 (1990). A prosecutor's improper remarks do not by themselves violate a defendant's constitutional rights; they only do so when they render the proceedings fundamentally unfair. *Jeffries v. Blodgett*, 5 F.3d 1180, 1191 (9th Cir. 1993), *cert denied*, 510 U.S. 1191 (1994); *Davis v. Woodford*, 384 F.3d 628, 644 (9th Cir. 2004) (quoting *Darden v. Wainwright*, 477 U.S. 168 (1986)). Henry's claim does not satisfy this test.

IT IS THEREFORE TENTATIVELY ORDERED:

A decision in this case has been delayed a long time. while this case has been pending numerous decisions of the Ninth Circuit and United States Supreme Court have been reached. This decision will stand as the tentative decision on Henry's application for habeas corpus at docket no. 39. Either party may file a legal memorandum responding to this tentative decision on or before **Monday, April 4, 2005**. the opportunity to file a supplemental brief shall be in lieu of oral argument. The Court will promptly reach a final decision after the time for supplemental briefing has expired.

Robert Henry's motion for post conviction relief, 28 U.S.C. § 2254 is **TENTATIVELY DENIED.** The clerk will be instructed to prepare a judgment dismissing this claim with prejudice. Although Henry's petition was filed pre-AEDPA, the United States Supreme Court has held that AEDPA's provisions regarding certificates of appealability apply to all cases where the notice of appeal is filed after AEDPA's effective date. *Slack v. McDaniel*, 529 U.S. 473, 482 (2000); *see also Phillips v. Woodford*, 267 F.3d 966, n.2 (9th Cir. 2001). Therefore, the Court will need to determine whether Henry should be given a certificate of appealability. 28 U.S.C. § 2253. The Court is satisfied that reasonable jurists would not disagree regarding the merits of Henry's claims 1, 3 and 4. No certificate shall issue as to those claims. Henry's second claim presents a closer question. The Court will therefore issue a certificate of

appealability as to the question of whether the prosecutor's discussion of Henry's statement to the police and the instruction on adoptive admissions denied Henry due process of law and prejudiced him under the *Brecht* standard.

Dated at Anchorage, Alaska, this 24 day of January 2005.

s/_____
JAMES K. SINGLETON, JR.
United States District Judge

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,	)	
	)	A035447
Plaintiff and Respondent,	)	
	)	(Super. Ct. No. 19726
v.	)	County of Solano)
	)	
ROBERT HENRY,	)	
	)	
Defendant and Appellant.	)	
	)	

Defendant Robert Henry (appellant) appeals a judgment imposing life without the possibility of parole following his conviction for first degree murder with special circumstances.

I. FACTS

The conviction at bench grew out of the killing of Andre Johnson who was shot from a passing car driven by Francis Lee Brewer (Brewer), a hired killer. The murder took place on Thanksgiving Day, 1985, in the vicinity of Country Club Crest in northern Vallejo and involved numerous members of the Henry and Taggart families, including appellant, his brothers Gary and John Henry, Jeffrey Taggart, and his cousins, Jester and Alex Taggart (hereafter; Jeffrey, Jester and Alex, respectively). Stated most favorably to respondent as it must

(*People v. Johnson* (1980) 26 Cal.3d 557, 576; *People v. Mosher* (1969) 1 Cal.3d 379, 395, disapproved on other grounds in *People v. Ray* (1975) 14 Cal.3d 20,30-31) the evidence reveals the following scenario.

At about 3 a.m. on November 28, 1985, Cedric Turner, the intended victim of the crime (hereafter: Turner), stood at the corner of Gateway and Rounds Streets in the Country Club Crest area in Vallejo. Wyatt Shellmon came along in his car and asked Turner if he could get some "base rocks"[2/] for him. After a yes answer, Shellmon picked up Turner and drove him to Sawyer Street to contact appellant who was selling cocaine. Moments later, appellant got into Shellmon's car. All three were heading towards the end of an isolated cul-de-sac in a remote area of the city. Shellmon suddenly stopped, pulled a gun and pointing it at appellant said, "Give me everything you have or I'll blow your head off." Appellant complied by giving up $30 in cash and some cocaine. Shellmon then ordered appellant out of the car and shortly thereafter dropped off Turner as well.

Following the robbery, appellant, Jeffrey and Jester met at appellant's house to discuss retaliation against Turner. After hearing appellant's recount that Turner had robbed him by putting a gun at his head, they unanimously decided to shoot (get) Turner.

For the apparent purpose of carrying out the plan, appellant during late afternoon arranged a meeting with Bernard Oden and the latter's friend, Brewer. At the meeting which took place in his house, appellant complained that he had been robbed of $400 at gunpoint and offered two "hubbas" (rock cocaine) to Brewer to give Turner "a good ass whipping." Brewer fully understood the true meaning of appellant's request. Immediately following the discussion, Brewer went to his girlfriend's house on Stella Street, picked up a .22 caliber sawed-off rifle and ammunition, loaded the gun with bullets,

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2. "Base rock" is a street term for cocaine.

placed it in the blue Plymouth he had stolen earlier and took off to Gateway Drive, the scene of the shooting.

Around 6 p.m. that evening, appellant and Jester confronted Turner on Gateway Drive and told him they were going to "take him out" and he "was gonna die." The duo then left and returned with Jeffrey, all three carrying guns. Appellant came face to face with Turner and repeated his threat that Turner was going to die. By now a crowd had gathered and Turner retreated to the driveway of the Morgan resident at Gateway. Jester, with appellant standing close by, urged the crowd to move because "somebody's going to get shot."

Turner fled inside the house. Andre Johnson was also there and after listening to Turner's description of what was going on said: "Come on, we'll handle it" and offered to give Turner a ride home. They walked outside together. As Turner walked over to Johnson's car and occupied the front passenger seat, the crowd asked Johnson why he was helping Turner, instead of letting him fight his own battles. Johnson threatened them back shouting that he and his brother would come back and tear up the place. Simultaneously Johnson and appellant were yelling and pushing each other; Johnson called appellant "wave set" an obvious slur on appellant's permed hair.

Meanwhile, Brewer and Oden arrived at the scene in the blue Plymouth and parked in front of Johnson's car. Brewer got out of the car and stood on the sidewalk observing the argument between appellant and Johnson. Appellant walked up to Brewer and pointed out Turner to him by saying: "That's the guy."

Thereafter, Brewer, with Oden as his passenger sitting in the front seat, drove down the street, made a U-turn and slowed down or stopped in the middle of the street next to Johnson's car. As Jester yelled "watch out, he's gonna shoot" Brewer leaned across Oden and fired numerous shots out of the passenger window of the car hitting and killing Johnson who was standing approximately 5 to 10-feet away. The evidence overwhelmingly demonstrates that at the time of the shooting Johnson was reaching for the door of his automobile and was

facing toward the crowd in the street rather than the blue car from which the shots were coming.

After the shooting, Brewer disposed of the murder weapon, wiped the fingerprints off the blue Plymouth and abandoned the car. Then, accompanied by Oden, he returned to the crime scene to ascertain if the victim had been shot. As a next step, Brewer, Oden and Jeffrey went to appellant's house on Sawyer Street. In the ensuing discussion, Brewer assured appellant that he had taken care of the job and that appellant did not have to worry any more. Appellant indicated that he was willing to pay but added since Brewer had killed the wrong man, the original price would be reduced in half from $200 to $100.[3] The fact that the Johnson killing occurred as a result of an agreement to kill Turner, was further corroborated by appellant himself. The record reflects that after his arrest for the Johnson homicide appellant stated to Detective Bawart: "I hired Lee Brewer to kill Cedric Turner. He killed the wrong guy. I can't understand why I'm being charged."

The thrust of appellant's defense was that Brewer killed Johnson based on an independent motive. Under this hypothesis, since Brewer did not mistakenly or inadvertently shoot Johnson while intending to shoot Turner, the doctrine of transferred intent could not be applied to convict appellant. In

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3. The pertinent part of the record reads as follows: "Q. What happened the second time you'd been there now after the shooting what took place? [¶] A. Just - - Lee told - - Lee Francis [Brewer] told him, Robert Henry that, uh, he had tooken care of that. [¶] Q. And what was said to him by Mr. Henry? [¶] A. He told him that he didn't have that right now, but he could come back later and he would give it to him. [¶] Q. Then what happened? [¶] A. Uh, shortly after that, asked exactly what happened. He said, 'You don't have to worry about him no more.' [¶] Q. Who asked that" [¶] A. He asked Lee. [¶] Q. When you say 'he,' who are you referring to? [¶] A. Robert Henry. [¶] Q. Asked him what? [¶] A. Exactly what had happened, and Lee told him, replied to him, 'Well, you don't have to worry about him no more. . . . '" [¶] Q. And did they discuss the payment? [¶] A. Yes. They indicated that, because he had hit–shot the wrong man, that he was only going to pay half of the moneys; instead of paying $200, he was going to be paid only 100." (Emphasis added.)

support of this theory a defense criminalist testified that the angles and the bullet trajectories indicated that Johnson was the intended target and that he was struck while on the ground or falling towards the ground. The defense also examined a psychologist who administered an "I.Q." test to appellant. According to his testimony, appellant's "I.Q." was at 75 which constitute borderline mental deficiency.

Based upon the foregoing evidence, appellant was convicted of first degree murder (Pen Code,[4] § 187) under the theories of aider and abettor and transferred intent. The jury found the special circumstance allegation of intentional murder for financial gain (§ 190.2, subd. (a)(1)) and the firearm use allegation (§ 12022, subd. (a)) to be true. Appellant's motion for a new trial and/or to dismiss the special circumstance finding was denied, and he was sentenced to life imprisonment without possibility of parole.[5] Appellant raises numerous issues on appeal which are discussed below.

II. GUILT PHASE ISSUES

A. Sufficiency of the Evidence

Appellant's first contention on appeal is that the judgment of conviction is unsupported by substantial evidence because (a) the record fails to sustain that he intended to kill Turner, and (2) the evidence is insufficient to establish that he could reasonably foresee that Brewer would shoot someone for personal reasons. We disagree.

Since appellant was not the perpetrator of the killing, his culpability rests on his status as an aider and abettor. Under well-settled law, in order to insure criminal liability an aider and

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4. Unless otherwise indicated, all statutory references are to the Penal Code.

5. The district attorney stated at the outset of trial that "they will not be seeking the death penalty.

abettor must act with knowledge of the criminal purpose of the perpetrator and with an intent of either committing or encouraging or facilitating the commission of the offense. (*People v. Yarber* (1979) 90 Cal.App.3d 895, 915-916; *People v. Vasquez* (1972) 29 Cal.App.3d 81, 87.) As far as the intent element of the crime goes, the aider and abettor must share the specific intent of the perpetrator. The shared intent exists when, acting with knowledge of the full extent of the perpetrator's criminal purpose, the accomplice aids and encourages the perpetrator with intent of facilitating the crime. (*People v. Beeman* (1984) 35 Cal.3d 547, 560.) It is likewise settled that the liability of an aider and abettor extends also to the natural and reasonable consequences of the acts he knowingly and intentionally aids and encourages. (*Ibid.*; *People v. Beltran* (1949) 94 Cal.App.2d 197, 207.)

As a further preliminary matter, we also set out the rules governing the stand of review regarding the sufficiency of the evidence of a criminal conviction. It is well established that the appellate court must view the evidence in the light most favorable to respondent and presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Mosher, supra*, 1 Cal.3 at p. 395.) If the facts reasonably justify the trier of fact's findings the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment. (*People v. Robillard* (1960) 55 Cal.2d 88, 93; *People v. Reilly* (1970) 3 Cal.3d 421, 425.) The test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt. (*People v. Wright* (1985) 39 Cal.3d 576, 591; accord *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) As summarized in *People v. Johnson, supra*, 26 Cal.3d at p. 578, the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses such substantial evidence that a reasonable trier of fact could find the defendant guilty beyond a reasonable

doubt.

In the case at bench there is substantial (if not conclusive) evidence that appellant intended to kill Turner and that Brewer, the perpetrator of the crime, carried out the shooting upon a prior agreement, with the full knowledge and encouragement of appellant.

Appellant's intent to kill Turner is demonstrated by a host of evidence. Following the robbery appellant, Jeffrey and Jester met in Jeffrey's house where they decided to shoot Turner because of his participation in the holdup. Prior to the afternoon shootout, there were three confrontations between Turner and appellant and his friends (Jeffrey and Jester). On all three occasions appellant and his companions explicitly threatened Turner with death by repeating that he was going to die and/or he was going to be taken out.[6/] At one point they were armed, but they did not use their weapons because as Jeffrey later told the police "they had what's his name to do it, Brewer."

Furthermore, appellant's intent to kill Turner as well as his knowledge and encouragement of the killing are conclusively

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6. Excerpts from Turner's testimony: [¶] "Q. Did you have any problems with anybody on Gateway Drive about that day that time? [¶] A. Yes, I did. [¶] Q. Who did you have problems with? [¶] It was Robert Henry, Jester Taggart, Jeffery Henry and Alex Taggart. [¶] Q. Where were you when this first started to occur, this problem?. [¶] A. On Gateway and Rounds Street. [¶] Q. Who did you have contact with first? [¶] A. Robert Henry and Jester Taggart. [¶] Q. And did you engage with them in a conversation? [¶] A. Yes, I was trying to, yeah. [¶] Q. And what did - - what did Mr. Henry tell you? [¶] A. He told me that I was gonna die; he didn't want to hear it. [¶] Q. Excuse me. I didn't hear the last part. [¶] A. He said he didn't want to hear it, that I was going to die. [¶] Q. What was he - - did you say something to him? [¶] A. Yeah, I told him I wanted to talk to him. [¶] Q. About the incident? [¶] A. Yes, I did. [¶] Q. And he said he didn't want to hear it? [¶] A. Yes. [¶] Q. Did Jester Taggart say anything to you? [¶] A. No, he just kept on saying that I was going to die. [¶] Q. They both said that to you? [¶] Yeah. . . ." [¶] Q. Did they make any threats to you while they had the guns? [¶] A. Uh, yes, they told me that I was going to die. [¶] Q. They continued to tell you that you were going to die? [¶] A. Over and over, yes. [¶] Q. And who specifically said that? [¶] A. Robert Henry." (Emphasis added.)

established by his agreement made with Brewer. While Oden testified that appellant offered rock cocaine to Brewer to give Turner only a "good ass whipping" the record as a whole, including appellant's statement to the police, indicates that the agreement at issue was in effect a contract for killing.

The above proposition is sustained by a wealth of evidence. To recall, right after the discussion with appellant, Brewer picked up ammunition and a rifle and drove to the scene of the crime. While there, appellant pointed out Turner to him as the intended victim. After the shootout, Brewer returned to the scene to ascertain if the victim had been shot. Thereafter, he met with appellant, advised him that he took care of the problem and demanded the agreed upon price for the job. Appellant retorted that Brewer had killed the wrong man and therefore reduced his fee to half of the agreed amount. Last, but not least, appellant himself admitted to the police: "I hired Lee Brewer to kill Cedric Turner." In light of this record appellant's contention that the evidence was insufficient to show his knowledge of Brewer's criminal purpose and the requisite shared intent to encourage and facilitate Brewer's criminal objective, is hollow indeed and must be firmly rejected.

Appellant's argument that the alternative theory of aiding and abetting is not supported by sufficient evidence inasmuch as he could not reasonably foresee that Brewer would kill anybody much less that he could kill a third person, also fails. The intentional and knowing aiding and promoting Brewer's criminal purpose by itself is sufficient to sustain the conviction and renders the alternative theory of appellant's criminal liability inconsequential. Moreover, appellant's assertion is predicated upon the false premise that the agreement in dispute called for merely beating up rather than killing Turner and that appellant was unaware of Brewer's criminal design to kill. As discussed above, this premise is unsupported by record. Furthermore, the liability of an aider and abettor is not limited to the intended crime, but extends also to the natural and reasonably foreseeable consequences of any acts he knowingly

and intentionally aids and promotes. (People v. Beeman, supra, 35 Cal.3d at p. 560.) As the agreement at bench called for an outright killing rather than just a beating, the shooting with the resultant death of a human being (including a passerby or other incidental victim) was entirely foreseeable.

B. Alleged Evidentiary Errors

(1) Exclusion of Prior Crimes: Appellant sought to introduce evidence of prior criminal conduct by Brewer for the purpose of showing that "'he had an explosive personality and was likely in a confrontational situation to become enraged and strike out at otherwise innocent persons." Specifically, appellant offered to prove that approximately 23 days before the Johnson killing, Brewer committed an armed robbery; during the commission of that crime the victim, a 66-year-old man, took a swing at Brewer and swore at him, and Brewer became so incensed that when the man turned and started to walk away, he shot him in the back. Appellant insisted that the proffered evidence tended to prove that Brewer did not kill Johnson by mistake or inadvertence, but rather harbored an independent motive which foreclosed the applicability of the transferred intent and foreseeable consequence doctrines to this case. After a hearing the trial court ruled that the proffered evidence was inadmissible because the two situations were different and that the evidence was excludable under Evidence Code section 352 as well, inasmuch as its probative value was outweighed by its prejudicial effect.[7/] Appellant argues that the exclusion of the

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7. The trial court explained its ruling as follows: "As far as I can determine from the evidence, and you did go over it again, the swearing was directed at people in general. Mr. Oden put Mr. Brewer as one of the more distant individuals in this crowd of some 50 around Mr. Johnson and the scene. That is far, far different from the situation where there's a one-on-one, an attempted assault, very much directed swearing and flight. It is so far distant that, certainly under 352 of the Evidence Code, I feel that its relevance, if any, is far outweighed by the prejudice that it would engender by introducing that evidence."

prior crime was prejudicially erroneous because (1) the proffered evidence was admissible under Evidence Code section 1101, subdivision (b), in order to show motive and intent; and (2) the trial court erred in applying Evidence Code section 352 to exclude evidence which has been made admissible under section 1101, subdivision (b), of the Evidence Code. Neither of these contentions has any merit.

Evidence of other crimes is inadmissible under the statute unless it is relevant to prove some fact other than the person's propensity to commit the crime. (Evid. Code, § 1191.)[8/] The case law teaches that before permitting the jury to hear evidence of other offenses, the court must ascertain whether that evidence is relevant (i.e., whether it tends logically, naturally and by reasonable inference to prove the issue upon which it is offered). (Evid. Code, § 210; People v. Thompson (1980) 27 Cal. 3d 303; 316; People v. Peets (1946) 28 Cal.2d 306, 315.) In determining relevance the "court must look behind the label describing the kind of similarity or relation between the other offense and the charged offense; it must examine the precise elements of similarity between the offenses with respect to the issues for which the evidence is proffered.. . . ." (People v. Schader (1969) 71 Cal.2d 761, 775; People v. Thompson, supra, 27 Cal.3d 303.) Furthermore, if the connection between the uncharged offense and the ultimate fact (which is intended to be proved) is not clear, the evidence should be excluded. (People v. Durham (1969) 70 Cal.2d 171, 186-187, see also

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8. Evidence Code section 1101 provides in relevant part: "(a) Except as provided in this section and in Sections 1102 and 1103, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or hr conduct on a specified occasion. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence or mistake or accident . . .) other than his or her disposition to commit such n act.")

People v. Sam (1969) 71 Cal.2d 194, 203.)

The above cited principles are applicable where, as here, the evidence of another offense is offered to prove intent or motive. As stated in Thompson: "It has been assumed on occasion that a showing of substantial similarity is not required if intent is the material fact sought to be proved by the introduction of an uncharged offense. This assumption is too broad. It is correct only when the similarity of offenses is irrelevant to the chain of inference sought to be drawn between the uncharged offense and the fact of intent in the charged offense. . . . [¶] However, similarity is often necessary to bridge the gap between other crimes evidence and the material fact sought to be proved." (People v. Thompson, supra, 27 Cal.3d at p. 319, fn. 23.)

It follows that in the case at bench the trial court properly analyzed the similarities between the Johnson killing and the prior robbery and, in light of the evidence, correctly concluded that due to the vast discrepancies between the two offenses the other crime evidence was inadmissible to prove the intent or motive of the perpetrator. Significantly enough, the evidence at bench unmistakably shows that there was no personal confrontation or argument between Johnson and Brewer prior to the shooting. The witnesses testified that Brewer stood on the sidewalk some distance away and that Johnson was quarreling with the crowd and appellant, rather than Brewer. For example, Oden recalled that Johnson was very upset and was arguing with the whole crowd and that the cursing and exchanging angry words took place between Johnson and the crowd, rather than between Johnson and a specific person or persons. Gary Henry, another witness, also confirmed that Johnson was yelling at everyone. Jeffrey likewise observed that the argument was between appellant and Johnson, and that Johnson was pushing and shoving appellant when Turner came out of the house. The latter was corroborated by Alex who testified that Johnson pushed appellant when the latter tried to approach Turner.

Appellant's claim that Johnson's statement right before the

shooting: "Go ahead, I can at least take one" was addressed at Brewer and could have provided sufficient provocation for the shooting, is taken out of context and is unsupported by the evidence. As mentioned earlier, the record convincingly shows that right before the shooting appellant was reaching toward the door of his car and was facing the crowd on the street rather than Brewer or his blue car.[9/] Moreover, Turner testified that the Johnson statement, "I could take at least one" was directed at Jester Taggart.[10/]

In sum, since Johnson did not personally argue, quarrel with or provoke Brewer, the other crime evidence involving a personal confrontation between Brewer and his victim was simply not sufficiently similar (and hence relevant) to prove Brewer's state of mind in committing the charged offense. Evidence of the prior robbery was properly excluded by the trial court as irrelevant. (Evid. Code, § 350.)

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9. The pertinent part of Turner's testimony reads as follows: "Q. Now, just prior to the shooting, within seconds, did you hear anybody say anything? [¶] A. Before the shooting? [¶] Q. Just before the shooting. [¶] A. Say, 'Watch out, he's gonna shoot.' [¶] Q. Who said that? [¶] A. Sounded like Jester Taggart. [¶] Q. Did Mr. Johnson say anything before he was shot? [¶] A. He said, 'Yes, I can at least take one.' [¶] Q. Could you tell where he was, where he was faced in relationship to this blue car he said this? [¶] A. He wasn't faced towards the blue car. He was faced towards the street. [¶] Q. Facing where? [¶] A. Towards the street." (emphasis added.)

10. Excerpts from Turner's testimony on redirect: "Q. And I asked you" 'Now, did you hear Mr. Johnson say anything before he was shot?' Your reply? [¶] A. 'Yeah.' [¶] Q. Did I say - - I asked you, 'Did you' - - [¶] A. 'Yeah.' [¶] Q. 'And what did he say?' [¶] A. 'He said, "I could take at least one."' [¶] Q. Did I ask you then: 'Who was that - - who were those directed towards?' What was your answer? [¶] A, 'Jester Taggart.' [¶] Q. Did I ask you: 'Where was Jester Taggart?' [¶] A. 'On the corner of Simonton Street.' [¶] Q. Did I ask you: 'In relationship to the car where the shots came from, where was he?' What did you say? [¶] Right here? [¶] Q. Yes. [¶] A. 'In relationship' - - [¶] Q. And I asked you: 'How close to the car was he?' [¶] A. 'About 15 feet.' [¶] Q. 'So, Mr. Johnson says to Jester Taggart that he could take one of them?' [¶] A. 'Yeah.' " (Emphasis added.)

Moreover, the other crime evidence was also excludable pursuant to Evidence Code section 352. Under this section the court, in its discretion, may exclude evidence if its probative value is outweighed by its prejudicial effect or if its admission would confuse the issue or mislead the jury. The discrepancies between the evidence of the charged offense and the proffered evidence of the other crime affected not only the relevancy, but also justified the trial court in excluding such evidence for lack of its probative value and also because the offered evidence would only confuse the issue and/or mislead the jury. The trial court has wide discretion under Evidence Code section 352 to exclude such evidence and its ruling will not be disturbed on appeal in the absence of showing an abuse of discretion. (*People v. Diamond* (1970) 10 Cal.App.3d 798, 801.)

Appellant's assertion that the other crime evidence falling within the purview of Evidence Code section 1101, subdivision (b), is not subject to the court's discretionary power under Evidence Code section 352, is incorrect. As our Supreme Court succinctly stated in *People v. Thompson, supra*, 27 Cal.3d 303, 317, footnote 17: "[E]vidence of other crimes is not automatically admissible under subdivision (b) whenever it is offered to prove an intermediate fact other than disposition. Subdivision (b) merely clarifies the fact that subdivision (a) 'does not prohibit' the admission of such evidence when it is offered to prove a fact other than disposition. (Cal. Law Revision Com. comment to Evid. Code, § 1101.) *The evidence of other crimes must still satisfy the rules of admissibility codified in sections 210, 350 and 352.*" (Emphasis added.)

(2) Adoptive Admissions: During the course of the trial, Oden testified, without contemporaneous objection by defense counsel, concerning the conversation between Brewer and appellant after the shooting. According to Oden, Brewer reported to appellant that "he had tooken care of that." Appellant then told Brewer, "he didn't have that right now, but he [Brewer] could come back later and he [appellant] would give it to him." Appellant asked Brewer what happened.

Brewer replied, "You don't have to worry about him no more."

Counsel for appellant subsequently argued in chambers that these statements were not admissible as admissions or coconspirator declarations. The trial court admitted them as adoptive admissions. Because there was conflicting evidence as to whether appellant was present when Brewer made these remarks, the question of appellant's presence correctly was left for the jury to resolve. Having admitted the evidence, the trial court instructed the jury on adoptive admissions using CALJIC No. 2.71.5 (4th ed. 1979).[11/] Appellant now claims he was denied effective assistance of counsel because trial counsel failed to object to admission of the evidence in a timely fashion or to move to have it stricken. He also asserts the statements were inadmissible as adoptive admissions and challenges the legality of CALJIC No. 2.71.5.

The test for establishing ineffective assistance of counsel is twofold. In addition to showing that counsel failed to act in a manner comporting with that of a reasonably competent lawyer, defendant must also demonstrate that absent counsel's inadequacies it is reasonably probable a more favorable determination would have resulted. (*People v. Gates* (1987) 43 Cal.3d 1168, 1183.) Because we conclude the evidence was properly admitted, we need not further address the competency issue.

Evidence Code section 1221 embodies the adoptive admission exception to the hearsay rule: Evidence of a hearsay statement offered against a party is admissible as an adoptive admission "if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." When a person is accused of committing a crime under circumstances affording him an opportunity to refute the accusation, and where there is no indication that he or she is relying on Fifth

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11. All CALJIC instructions referred to are from the fourth edition unless otherwise noted.

Amendment rights, the accusation and silence or equivocation are admissible as an adoptive admission of guilt. (*People v. Preston* (1973) 9 Cal.3d 308, 313-314.) The party need not explicitly acknowledge the veracity of the accusatory statement; the typical response is one of evasion, equivocation or even silence. (*People v. Humphries* (1986) 185 Ca1.App.3d 1315, 1335.)

Appellant insists that in the present case Brewer's comments were not accusatory; nor did they compel a response from appellant. Thus he argues no inference reasonably could be drawn from his response. We disagree. Under the circumstances Brewer's statement was an admission on his part that he had performed the contract which, in turn, carried the implied accusation that appellant had hired him to carry out the killing. Appellant's silence or failure to refute the statement, coupled with the equivocal response that he didn't have "that" right now and his further inquiry as to exactly what happened, manifested adoption of Brewer's accusatory statement.

Finally, appellant also assails the legality of CALJIC No. 2.71.5, complaining that it incorrectly sets forth the requisite findings to be made by the jury with respect to adoptive admissions.[12/] According to appellant, the objectionable instruction fails to instruct the jurors that they must determine whether the appellant's failure to reply showed criminal intent

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12. The following instruction, modeled closely after CALJIC No. 2.71.5, was given to the jury: "If you should find from the evidence that there was an occasion when the Defendant, under conditions which reasonably afforded him an opportunity to reply, failed to make denial or made false, evasive or contradictory statements in the face of an accusation expressly directed to him or in his presence charging him with the crime for which he is now on trial or tending to connect him with its commission, and if you should find that he heard the accusation and understood its nature, the circumstance of his silence or the conduct on that occasion may be considered against him as indicating an admission that the accusation thus made was true. [¶] Evidence of such an accusatory statement is not received for the purpose of proving its truth, but only as it supplies meaning to the silence and conduct of the accused in the face of it; and unless you should find that his conduct at the time indicated an admission that the accusatory statement was true, you should entirely disregard the statement."

or consciousness of guilt. Appellant is manifestly wrong; the instruction ends with very clear directions to ignore the statement if the incriminating inference cannot be drawn from appellant's conduct: "[U]nless you should find that his conduct at the time indicated an admission that the accusatory statement was true, you should entirely disregard the statement."

C. Jury Instructions

(1) Transferred Intent Instruction: As pointed out earlier, appellant's liability was predicated on the doctrines of aiding and abetting and transferred intent. If a person purposely or by deliberate and premeditated malice attempts to kill one person, but by mistake or inadvertence kills another instead, the law transfers the intent and the homicide so committed is murder of the first degree. (*People v. Sears* (1970) 2 Cal.3d 180, 189; *People v. Siplinger* (1967) 252 Cal.App.2d 817, 825.) In accordance therewith, the jury was instructed per CALJIC No. 8.65 which states, "When one attempts to kill a certain person, but by mistake or inadvertence kills a different person, the crime, if any, so committed is the same as though the person originally intended to be killed had been killed." Appellant claims that the instruction given in the language of CALJIC No. 8.65 was inadequate in the present case and that the trial court had a sua sponte duty to further instruct that if Brewer killed Johnson for independent, personal reasons rather than by mistake or inadvertence, appellant could not be held criminally liable for Brewer's act. Appellant's point is not well taken.

It is settled law that in a criminal case the trial court must instruct the jury sua sponte on the general principles of law relevant to the issues raised by the evidence, but need not instruct on specific points developed at trial. (*People v. Flannel* (1979) 25 Cal.3d 668, 682.) The general principles of law governing the case are those principles closely and openly connected with the facts before the court and which are necessary for the jury's understanding of the case. (*People v. St.*

Martin (1970) 1 Cal.3d 524, 531.) While the duty to instruct on the general principles of law extends also to the defenses raised in the case, the obligation to give sua sponte instruction on a particular defense arises only if the defendant relies on such defense and there is substantial evidence supporting the same. (*People v. Sedeno* (1974) 10 Cal.3d 703, 715, overruled on other grounds in *People v. Flannel, supra* 25 Cal.3d at p. 684; *People v. Wickersham* (1982) 32 Cal.3d 307, 326.) Substantial evidence cannot be equated with "any" evidence; it must be of ponderable significance, reasonable in nature, credible and of solid value. (*Estate of Teed* (1952) 112 Cal.App.2d 638, 644; see also *People v. Johnson, supra*, 26 Cal.3d at p. 576.)

When viewed under these principles, appellant's claim of error must be rejected because the instruction of the trial court was both correct and complete; it clearly specified that the transferred intent applied only if the killing of the unintended victim (i.e., Johnson) took place by mistake or inadvertence. Consequently, the additional instruction (i.e., that the theory of transferred intent was inapplicable if Brewer killed Johnson, the unintended victim for independent, personal reason rather than by mistake or inadvertence) would have been redundant; it would have amounted to no more than a further elaboration of a point adequately covered by the instruction already given. The trial court's duty to instruct sua sponte does not extend to redundant or cumulative instructions which go beyond the general principles of law and are unnecessary for the jury's understanding of the case. (*People v. St. Martin, supra*, 1 Cal.3d at p. 531.)

Furthermore, appellant's contention fails for lack of substantial evidence showing that Brewer killed Johnson for a personal reason, independent of the contract to kill Turner. Contrary to appellant's insistence, the evidence introduced at trial conclusively establishes that Brewer shot Johnson under the mistaken belief that he was Turner. This conclusion is inescapable since the murder for hire targeted Turner and immediately after the shooting Brewer showed up at appellant's

house to claim his bounty for carrying out that contract.

The evidence cited by appellant to prove that Brewer intentionally shot Johnson (i.e., Johnson stood but a few feet away; the projectories and angles of the projectiles indicated that Johnson was the intended target; Turner was pointed out to Brewer prior to the killing) neither precludes nor contradicts the jury's conclusion that Brewer mistakenly believed he had shot Turner. This is especially so in view of the fact that Brewer had only a brief glimpse of Turner before he left the scene and returned to commit the crime and in view of the uncontradicted evidence that following the shooting he expressed his belief that he had killed Turner, the subject of the contract. Moreover, the record is devoid of any substantial evidence that Brewer entertained personal malice or any independent motive toward Johnson. The swearing and arguments on the part of Johnson were directed at the crowd and appellant; Brewer was only an observer, not a target, of Johnson's animosity. Finally, we fail to see how the statement that Johnson was "talking a mile a minute" would provide Brewer with a personal, independent motive for shooting Johnson. In sum, since appellant failed to produce substantial evidence to support the defense hypothesis that Brewer had an independent motive to kill Johnson, the trial court was under no sua sponte duty to instruct on that theory.

(2) Scope of Aider and Abettor Liability: As pointed out earlier, the aider and abettor is liable not only for the planned crime he intended to facilitate, but also for the natural and reasonable or probable consequences of any act (including any reasonably foreseeable offense) he knowingly and intentionally encouraged. (*People v. Beeman, supra*, 35 Cal.3d at p. 560; *People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5.) Consistent therewith, the trial court instructed the jury per CALJIC No. 3.00: "One who aids and abets is not only guilty of the particular crime that, to his knowledge, his confederates are contemplating committing, but he is also liable for the natural and reasonable or probable consequences of any act that he knowingly or intentionally aided or encouraged."

Appellant contends that since the determination of whether an unplanned crime is the natural and reasonable consequence of the planned offense which the defendant allegedly assisted is a question of fact (*People v. Durham, supra*, 70 Cal.2d at p. 181; *People v. Rogers* (1985) 172 Cal.App.3d 502, 515), the trial court should have given a supplemental instruction delineating the jury's fact-finding obligation (*People v. Hammond* (1986) 181 Cal.App.3d 463) and that its failure to do so constituted error. We agree.

The case in point is *Hammond*. Similar to the case at bench, the defendant in *Hammond* was tried as an aider and abettor to a felony murder committed during a robbery, and as to the foreseeable consequence doctrine the jury was instructed per CALJIC No. 3.00. On appeal defendant contended that CALJIC No. 3.00 is erroneous and should be supplemented because it instructs the jury to *assume rather than find* whether the unplanned crime was in fact a natural and probable consequence of the planned crime. The reviewing court agreed and held that "when, as here, a defendant is charged not only with the perpetrator's planned offense but with another offense ultimately committed as a natural and probable consequence thereof, CALJIC No. 3.00 (4th ed. 1979) [including the 1984 revision]) should be supplemented with an instruction clarifying the jury's related responsibility to determine whether the act committed was in fact a natural and probable consequence of the criminal act knowingly and intentionally encouraged." (*People v. Hammond, supra*, 181 Cal.App.3d at p. 469.)

However, as in *Hammond*, we find that the instruction error here was harmless. Appellant's main theory that Brewer's act was unforeseeable because he killed Johnson for independent reasons or motive is not substantiated by the record. (See discussion, *supra*). Furthermore, since the agreement between appellant and Brewer called for killing Turner, a human being, it was reasonably foreseeable that Brewer by mistake of inadvertence could kill the wrong person. Under these circumstances it is not reasonably probable that in the absence

of the instructional error a more favorable verdict to appellant would have been reached; as a consequence the error must be deemed harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Appellant additionally contends that CALJIC No. 3.00 (1984 revision) should have been accompanied by supplemental instructions elaborating the basis for resolving the foreseeability determination. We disagree.

Here, the instruction itself stated that the aider and abettor is guilty of the "natural and reasonable or probable consequences" of acts he knowingly and intentionally encouraged. Such an instruction amplifies sufficiently the test of foreseeability and informs the jury concerning the analysis required. Moreover, trial courts do not have a sua sponte duty to give amplifying instructions when the terms employed in the instructions are commonly understood by persons familiar with the English language; such a duty arises only where the terms have a "technical meaning peculiar to the law." (*People v. Anderson* (1966) 64 Cal.2d 633, 639-640; *People v. Montero* (1986) 185 Cal.App.3d 415, 430.) The phrase "natural and reasonable or probable consequences" does not have a technical meaning peculiar to the law and we presume it to be within the common understanding of jurors, such that further elaboration is not required.

Appellant further urges us to rule that CALJIC No. 3.00 (1984 revision) is constitutionally infirm because it (1) substitutes negligence for specific intent as the mens rea for accomplice liability, and (2) permits a lesser mens rea to convict the accomplice than to convict the principal for the same crime. In support of his argument appellant cites numerous commentators, including the drafters of the Model Penal Code, as criticizing the foreseeable consequences doctrine.

The answer to appellant's contention is *People v. Croy, supra*, 41 Cal.3d 1, where our Supreme Court upheld the constitutionality of CALJIC 3.00 by stating: "The requirement that the jury determine the intent with which a person tried as an

aider and abettor has acted is not designed to insure that his conduct constitutes the offense with which he is charged. His liability is vicarious. Like the conspirator whose liability is predicated on acts other than and short of those constituting the elements of the charged offense, if the acts are undertaken with the intent that the actual perpetrator's purpose be facilitated thereby, he is a principal and liable for the commission of the offense. Also like a conspirator, he is guilty not only of the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he aids and abets . . . . [¶] It follows that a defendant whose liability is predicated on his status as an aider and abettor need not have intended to encourage or facilitate the particular offense ultimately committed by the perpetrator. *His knowledge that an act which is criminal was intended, and his action taken with the intent that the act be encouraged or facilitated, are sufficient to impose liability on him for any reasonably foreseeable offense committed as a consequence by the perpetrator.* It is the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense, which *Beeman* holds must be found by the jury. [Citation.]" (At p. 12, fn. 5, emphasis added; accord *People v. Luparello* (1986) 187 Cal.App.3d 410, 441.) It is, of course, elementary that under the doctrine of stare decisis we are bound to follow the decisions of our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Finally, appellant argues that since the jury was instructed on "alternative" theories of aider and abettor liability, the judgment of first degree murder must be reversed because the reviewing court cannot determine from the record which theory formed the basis for the verdict.[13/]

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13. The jury was also instructed in the language of CALJIC No. 3.01 (1984 Revision) as follows: "A person aids and abets the commission of a crime when he or she, one with knowledge of the unlawful purpose of the perpetrator and two with the intent or purpose of committing, encouraging or facilitating the commission of the offense, by act or advice, aids,

This contention of appellant cannot stand for two chief reasons. One, the law is well established that if one of the two theories is supported by overwhelming or strong or convincing evidence, the judgment based upon the verdict will not be reversed even if the alternative theory rests on erroneous instruction. (*People v. Haskett* (1982) 30 Cal.3d 841, 851; *People v. Camden* (1976) 16 Cal.3d 808, 816; *People v. Atkins* (1982) 128 Cal.App.3d 564, 569.) The proposition that appellant hired Brewer to kill (not only to beat up) Turner and that Brewer proceeded to carry out the agreement with appellant's intent, knowledge and encouragement, is supported not only by strong or overwhelming, but virtually conclusive evidence. (See discussion, *supra*.) Two, appellant's assertion is based upon the hypothesis that the foreseeable consequences instruction was prejudicially erroneous. Since we have concluded otherwise, appellant's contention automatically fails.

(3) *Mental Retardation Defense*: A defense psychologist testified that appellant, with a full scale "IQ" of 75, was borderline mentally retarded. The jury received no instructions relating that evidence to any legal defense to the charged crimes. Appellant now submits that the trial court had a sua sponte duty to provide instructions on the defense of idiocy found in section 26, which provides in pertinent part as follows: "All persons are capable of committing crimes except . . . idiots."

In *In re Ramon M.* (1978) 22 Cal.3d 419, the Supreme Court reviewed the limited treatment afforded to the idiocy defense by the courts and determined that because the terms "idiocy," "lunacy" and "insanity" all described mental conditions rendering a defendant not "of sound mind," a single test would suffice to define each defense. (*Id.*, at p. 415.) Moreover, the Supreme Court had just repudiated the M'Naghten test of insanity, adopting instead the American Law Institute (ALI) formulation. (*People v. Drew* (1978) 22 Cal.3d 333, 339, 348.[14]

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promotes, encourages or instigates the commission of the crime."

14. The ALI formulation reads as follows: "A person is not

Against this background the court then concluded that (1) the ALI tests encompasses both idiocy and insanity; (2) the defense of idiocy is governed by the ALI standard; and (3) mental retardation thus constitutes a defense to criminal conduct if "'at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.'" (*In re Ramon M., supra*, 22 Cal.3d at p. 428.)

At the time *Ramon M.* was decided, the statutory scheme governing the insanity and idiocy defenses was substantially different from the present scheme. We start with section 20, requiring that a union of act and intent must exist in every crime. As to intent, former section 21, enacted in 1872, provided: "The intent . . . is manifested by the circumstances connected with the offense, and the sound mind . . . of the accused," "sound mind" being defined by exclusion to refer to everyone *except* idiots, lunatics or persons affected with insanity. The 1981 amendment to section 21 deleted reference to the sound mind of the accused and the definition thereof. (Stats. 1981, ch. 404, § 1, p. 1591.) Concurrently, former subdivision three of section 26, which included lunatics and insane persons within the class of persons incapable of committing crimes, was also deleted by amendment. (Stats. 1981, ch. 404, § 3, p. 1592.) Finally, the electorate in 1981 adopted the initiative measure popularly known as Proposition 8 which restored M'Naghten as the proper test for the insanity defense. (§ 25, subd. (b).)[15/]

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responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." (Model Pen. Code (Proposed Official Draft 1962) § 4.01, subpart (1).)

15. Section 25, subdivision (b), provides that the defense of insanity requires proof by a preponderance of the evidence that defendant was "incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the

The thrust of these changes is that idiocy, which previously was linked statutorily with lunacy and insanity by virtue of former sections 21 and 26, now stands alone in section 26. We nonetheless think that the logic compelling the *Ramon M.* court link the test for idiocy with the test for insanity still applies because they both describe mentally disabling conditions. Under this analysis, the proper test for mental retardation would be the M'Naghten rule. (§ 25, subd. (b).)

We return now to appellant's allegation of error, observing again that the trial court's sua sponte obligation to instruct on a specific defense only arises when a defendant relies on such defense or substantial evidence is adduced supporting the defense and the defense is compatible with defendant's theory of the case. (*People v. Sedeno, supra*, 10 Cal.3d at p. 716.) Here the record is devoid of *any* reliance on the part of appellant on the defense of idiocy. To the contrary, defense counsel made it clear in closing argument that the purpose of testimony concerning appellant's mental functioning was to assist the jury in evaluating statements made by appellant to the police, his theory being that a man with an "IQ" of 75 does not carefully select his language. This theory was also alluded to by the trial court when it responded to the jury's inquiry that sanity was not an issue in the case, the psychologist's testimony being proffered on the issue of appellant's ability to communicate. Additionally, there was not a shred of evidence produced at trial concerning appellant's capability to understand the "nature and quality" of his acts or to distinguish right from wrong at the time of commission of the crime. Since the evidence did not raise an issue as to the mental retardation defense as we understand it, there was no sua sponte duty to so instruct.

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commission of the offense." In *People v. Skinner* (1985) 39 Cal.3d 765, 776-777, the Supreme Court clarified that the use of the conjunctive "and" was a drafting oversight and that the statutory provision should be read in the traditional sense such that the disjunctive "or" connects both prongs of the M'Naghten test.

III. SPECIAL CIRCUMSTANCES ISSUES

A. Sufficiency of the Evidence

Appellant argues that the evidence was insufficient to establish the special circumstance of intentional murder carried out for financial gain. The two "hubbas" originally offered to Brewer were worth $50 at most. Appellant asserts this offer did not constitute valuable consideration within the meaning of section 190.2, subdivision (a)(l). He further argues that the homicide was primarily motivated by retaliation, and that such an insignificant consideration does not constitute a murder "carried out for financial gain." Finally, appellant contends the doctrine of transferred intent should not apply to the financial gain special circumstance.

These contentions must fail. First, the term "valuable consideration" has no application to the case at bar. Former section 190.2, subdivision (a) (Stats. 1977, ch. 316, p.1257), included a murder for hire special circumstance which referred to an "agreement by the person who committed the murder to accept a valuable consideration ...." The present death penalty statute, added by initiative measure in 1978, carries no reference to "valuable consideration," casting the special circumstance as follows: "The murder was intentional and carried out for financial gain." (§ 190.2, subd. (a)(l).)

Second, there is no quantum requirement attached to the concept of "financial gain" and, hence, the term is not stretched beyond its ordinary usage by including the value of two "hubbas" within its purview. Further, contrary to appellant's assertion, there is no reasonable doubt concerning the meaning of "financial gain" and the value attached to the concept. Rather, the statute requires only that the victim's death serve as "consideration for, or an essential prerequisite to, the financial gain sought by the defendant." (*People v. Bigelow* (1984) 37 Cal.3d 731, 751.) And in a murder-for-hire situation, the person who intentionally aids and abets the killer in the commission of

a first degree murder for the perpetrator's own financial gain becomes subject to special circumstance punishment by virtue of section 190.2, subdivision (b). (*Id.*, at p. 750, fn. 11; *People v. Freeman* (1987) 193 Cal.App.3d 337, 339.) Thus the defendant/hirer need not himself be financially motivated. (*Ibid.*)

Third, we disagree that from Brewer's vantage, the homicide was motivated primarily by retaliation, presumably as opposed to financial gain. The only evidence concerning retaliation relates to appellant's motive in hiring Brewer in the first instance. Concerning the allegation that Brewer killed Johnson for independent reasons of personal malice, the evidence does not support such a contention.

Fourth, the fact that Johnson was mistakenly or inadvertently killed instead of Turner does not preclude application of the financial gain special circumstance. From the killer's perspective, an intentional murder was committed with a view to financial reward. The court in *People v. Howard* (1988) 44 Cal.3d 375, cautions us that the relevant inquiry is "the particular defendant's purpose, whether or not achievable." (P. 410, fn. 8.) In cases where financial gain must be analyzed vis-a-vis the hired killer, the killer's purpose becomes the proper focus for determining applicability of the statute once the threshold derivative liability has been established. Here, there was evidence that Brewer intentionally killed the victim in order to obtain a financial benefit. The fact that he killed the wrong person does not detract from his purpose.

Based on our review of the record and contrary to appellant's contentions, we find there to be substantial evidence from which a rational trier of fact could conclude that (1) as between appellant and Brewer, Turner's death was consideration to appellant for a financial gain sought by Brewer, and (2) Brewer mistakenly or inadvertently killed the actual victim in order to benefit financially. Appellant offered Brewer either two "hubbas" or $200 (reduced to $100 because of the mistake) to beat up, shoot or kill Turner; and based on appellant's own

admission, he hired Brewer to kill Turner. The evidence also shows that Brewer acted on his agreement with appellant in order to fulfill its terms. Following his initial discussion with appellant, Brewer proceeded to arm himself and then continued to the site of the killing, observing the various actors. After the shooting, he sought his reward.

B. Financial Gain Instructions

As to the special circumstances allegedly present in this case, the trial court instructed the jury that if it found appellant guilty of murder in the first degree, "you must then determine if the murder was committed under the following special circumstance: intentional murder for financial gain . . . . [¶] To find the special circumstance referred to in these instructions as murder for financial gain is true, each of the following facts must be proved: [¶] One, that the murder was intentional; and [¶] Two, that it was carried out for financial gain."

Appellant would have us agree that the trial court had a sua sponte duty to define financial gain to include the element of motive as a prerequisite to sustaining the special circumstance. According to appellant this "error" was exacerbated by inclusion of the following instruction, patterned after CALJIC No. 2.51, within the instructions presented to the jury: "Motive is not an element of the crime charged and need not be proved. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt; absence of motive may tend to establish innocence. You will therefore[] give its presence or absence, as the case may bel the weight for which you find it to be entitled."

Our disagreement with appellant takes on a twofold analysis. First, we reiterate that under *Bigelow* and its progeny, rather than being subjected directly to the financial gain special circumstance, the hirer of a paid killer is subject derivatively under section 190.2, subdivision (b). (*People v. Bigelow, supra*, 37 Cal.3d at p. 750, fn. 11; *People v. Freeman, supra*, 193

Cal.App.3d at pp. 339-340.) Thus the inclusion of CALJIC No. 2.51 was entirely appropriate given that *as to the appellant*, financial motivation was not an issue. *His* crime, if any, was as an aider and abettor of an intentional murder carried out by the killer for financial gain.

Secondly, as to Brewer, there was no need to further define financial gain. Absent a request for amplification, it is sufficient for the court to define the elements of a crime by instructing in the unadorned language of the statute, but only if the jury easily could understand the statute without further guidance. (*People v. Failla* (1966) 64 Cal.2d 560, 565; see also *People v. Howard, supra*, 44 Cal.3d at p. 408.) If a term has a technical meaning peculiar to the law, the court on its own motion must supply the appropriate amplification; commonly understood terms do not require further embellishment. (*People v. Anderson, supra*, 64 Cal.2d at 641.)

The question then becomes whether the limiting construction of the financial gain special circumstance announced by the Supreme Court in *People v. Bigelow, supra*, 37 Cal.3d 731, is required in the present case. In *Bigelow*, the Supreme Court was concerned with the problem of multiple and overlapping findings of special circumstances based on the same conduct, most notably the overlap between the financial gain special circumstance and that of felony murder (§ 190.2, subd. (a)(17)), "since most robberies, as well as many burglaries, kidnapings and arsons, are committed for financial gain." (*Id.*, at p. 750.) Accordingly, the Supreme Court adopted a restricted formulation pursuant to which "the financial gain special circumstance applies only when the victim's death is the consideration for, or an essential prerequisite to, the financial gain sought by the defendant." (*Id.*, at p. 751.)

In *People v. Howard, supra*, 44 Cal.3d at p. 408, the Supreme Court decided that the phrase "for financial gain" is not a technical term except for the *Bigelow* limitations, and further cautioned that while the *Bigelow* articulation should be applied when important to avoid overlap, "it is not intended to restrict

construction of 'for financial gain' when overlap is not a concern." (P. 410.) Here we have no *Bigelow* concern and we do not think the meaning of the term "for financial gain"caused confusion. The statute adequately addresses the concept of motive in a non-*Bigelow* setting through the straight forward language "*for* financial gain."

C. Intent to Kill

Appellant challenges the special circumstances instructions as failing to require a specific intent to kill on his part. We agree with appellant that instructions on proof of intent to kill were required in his case, but contrary to appellant's assertions, the instructions were sufficient.

Specifically, the following instructions patterned in part after section 190.2, subdivision (b), were given: "If Defendant, Robert Henry, was an aider and abettor but not the actual killer, it must be proved beyond a reasonable doubt that he intended to aid in the killing of a human being before you are permitted to find the alleged special circumstance of that first degree murder to be true as to Defendant . . . . [¶] If the Defendant intentionally aided, abetted, counseled, commanded, induced, solicited, requested or assisted any actor in the commission of murder in the first degree, which murder was intentional and which was carried out for financial gain, you should find the special circumstance to be true."[16]

Appellant's constitutional arguments aside, when a defendant is guilty as an aider and abetter, section 190.2,subdivision (b), itself compels proof that he or she acted with intent to kill as a

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16. Section 190.2, subdivision (b), subjects a defendant to special circumstances findings under the following situation, among others: "Every person whether or not the actual killer found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting or assisting any actor in the commission of murder in the first degree . . . in any case in which . . . the special circumstances enumerated in [paragraph] (1) . . . of this section has been specially found . . . to be true."

prerequisite to finding that the financial gain special circumstance is true. In *Carlos v. Superior Court* (1983) 35 Cal.3d 131, 153, 154, the Supreme Court construed the word "intentionally" in section 190.2, subdivision (b), to apply to *all* defendants, perpetrators and accomplices alike, such that a defendant could not be subject to the felony murder special circumstance absent proof of intent to kill. The Supreme Court recently overruled *Carlos*, determining instead that intent to kill is not an element of the felony-murder or multiple-murder special circumstances, "but when defendant is an aider and abettor rather than the actual killer, intent must be proved." (*People v. Anderson* (1987) 43 Cal.3d 1104, 1147, 1149.) In reaching this decision, the court concluded as a general matter that "section 190.2, {subdivision] (b) lays down a special rule for a certain class of first degree murderers: if the defendant is guilty as an aider and abetter, he must be proved to have acted with intent to kill before any special circumstance (with the exception of a prior murder conviction) can be found true." (*Id.*, at p. 1142.)

This general conclusion was not arrived at through tortured statutory analysis; nor does the court's reasoning indicate that section 190.2, subdivision (b), is at all confusing or ambiguous in its intent to kill requirement as to aiders and abettors. On the contrary, the straightforward language of the statute compels this determination.

Likewise, the instant instruction, paralleling closely the language of section 190.2, subdivision (b), mandates proof of intent to kill. Appellant, however, contrasts these instructions with the instructions given in *People v. Fuentes* (1985) 40 Cal.3d 629, positing that while the *Fuentes* instructions properly instruct on intent to kill, the present instructions do not. In *Fuentes*, the jury was instructed as to sustaining the special circumstance allegation (commission of murder during attempted commission of robbery) that if defendant were an aider and abettor, "it would have to find that he 'intentionally aided . . . the actual killer in the commission of the murder of

the first degree with the specific intent to take a human life' . . . ." (*Id.*, at p. 639.)

Fuentes was a pre-*Anderson* decision wherein the court was concerned with *Carlos* error. The above instruction was recited in the context of explaining that the trial court failed explicitly to instruct on intent to kill if defendant were the actual killer. By implication it could be argued that the court blessed this instruction as being appropriate on the issue of aider and abettor intent to kill. Be that as it may, the present instruction is not inadequate on the intent issue because it fuses the mens rea of the accomplice with that of the perpetrator–the aider and abettor must *intend* to aid consummation of not just any crime or murder, but specifically a first degree murder which fits the special circumstance allegation in this case, namely, "which murder was intentional and carried out for financial gain." Moreover, the special circumstance requirement that the jury find defendant "intended to aid in the killing of a human being" could not be clearer on the issue of appellant's intent to kill.

Appellant also stresses the prosecutor's reliance on the foreseeable consequences involving an unintended crime and unintended victim, which he maintains aggravated the alleged instructional error.

As to the unintended crime, the return of the special circumstance finding under properly given instructions necessarily precluded the jury from returning a verdict of first degree murder on the basis that the killing was a foreseeable consequence of appellant's intention that Turner be administered a "good ass whipping." As to the unintended victim, the transferred intent instructions appropriately resolved that issue.

IV. MOTION TO DISMISS SPECIAL CIRCUMSTANCE

Appellant finally argues the trial court erred in failing to consider his borderline mental retardation as a mitigating factor when determining whether to exercise its discretion to dismiss

the special circumstances pursuant to section 1385. We disagree.

Section 1385, subdivision (a), provides in relevant part: "The judge or magistrate may, either on his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed." The cases hold that courts have authority under section 1385 to dismiss special circumstance findings in the furtherance of justice, thereby rendering a defendant eligible for parole. (*People v. Williams* (1981) 30 Cal.3d 470, 489; *People v. Lucey* (1986) 188 Cal.App.3d 551, 559.) However, as the Supreme Court has cautioned, the trial court's power to strike must be exercised in a careful and thoughtful manner; it must promote the administration of justice by assuring that the sentence be based upon the particular facts of the offense and all circumstances, and that the punishment exacted be fitting the crime as well as the perpetrator. (*People v. Williams, supra*, 30 Cal.3d at p. 489.)

In the case at bench the trial court complied with the above instructions. After reviewing the evidence and all other circumstances (including appellant's prior violent acts), the court concluded that the protection of society required the denial of the motion to dismiss the special circumstances, because appellant was involved in an intentional killing of a human being and he posed (and will pose) a danger to society. In addition, the record shows on its face that the trial court did consider appellant's mental retardations as a mitigating factor, but found it not to be an excuse to commit murder.[17]

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17. The pertinent part of the record reads as follows: "[The Court:] *It is said that he is not as gifted as some other people might be, but this is not something that the court of law accepts as an excuse.* [¶] *The fact that he did not act as rationally as someone else might have acted is to be expected, certainly in murder. Murder for hire is not a rational act.* It is not rational under any sort of circumstances. [¶] I can in many ways find – I certainly follow the concern that you voice, Mr. O'Hanlon, but it is not something that is contemplated by the law. [¶] I do not see in the course of this case mitigating factors that are sufficient to cause me to strike the

In view of this speaking record, appellant cannot well claim that his reduced mental capacity was not taken into account by the court as a mitigating factor and/or that the trial court has abused its broad discretion in any other way in refusing to dismiss the special circumstance finding in this case.

The judgment is affirmed.

Anderson, P.J.

We Concur:

Poche, J.

Channell, J.

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special circumstances. I frankly have no question as to this Defendant's involvement, having heard the evidence at trial. The only thing that didn't happen that he had intended to happen was a different person was killed. [¶] The fact that the society at which he lives may in a sense almost condone this kind of conduct, it does not excuse it in the greater society which we all live. Certainly I can't take into consideration the cost and that kind of factor. [¶] Therefore, *I intend to do what the law directs me to do, and that is for the protection of society. You may have given all the farious factors of this man's ability, his personality and his intellect.* Those are going to be with him for his life. [¶] *He is a danger to society now and* that ndicates there *is going to be a case in the future.* Therefore, I am going to deny the motion to strike the special circumstances. [¶] *That leaves me one choice in sentencing, and that is to sentence the Defendant* to the Department of Corrections *for life without possibility of parole.* (Emphasis added.)

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DOCKET (REGISTER OF ACTIONS)

HENRY, ROBERT

Case Number S056606

Date	Description	Notes
10/08/ 1996	Petition for writ of habeas corpus filed	By Pro per Petnr Robert Henry
01/28/ 1997	Petition for writ of habeas corpus denied	See Cites

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2004 Judicial Council of California

Filed June 8, 1989

ORDER DENYING WRIT OF HABEAS CORPUS

No. S010192

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

IN RE ROBERT HENRY
ON
HABEAS CORPUS

Petition for writ of habeas corpus DENIED for failure to allege sufficient facts. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)

s/_____
Chief Justice

California Courts – Appellate Court Case Information

CALIFORNIA APPELLATE COURTS

Case Information

Supreme Court

Court data last updated: 08/08/2007 02:53 PM

Case Summary Docket Briefs
Disposition Parties and Attorneys Lower Court

DOCKET (REGISTER OF ACTIONS)

THE PEOPLE v. HENRY, ROBERT
Case Number S007648

Date	Description	Notes
10/25/ 1988	Petition for review filed	By Aplt
12/22/ 1988	Petition for review denied	

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2004 Judicial Council of California

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

CHARLES D. MARSHALL, WARDEN, *Petitioner,*

v.

ROBERT HENRY, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX INDEX

	Page
Memorandum Opinion by Ninth Circuit Court of Appeals, filed March 12, 2007	1a
Order Denying Rehearing and Rehearing En Banc by Ninth Circuit Court of Appeals, filed May 16, 2007	5a
Tentative Order Denying Petition For Writ Of Habeas Corpus by United States District Court for the Eastern District of California, filed January 25, 2005	6a
Opinion Affirming Judgment of Conviction by California Court of Appeal, filed September 21, 1988	23a
Docket, Case No. S056606, Showing Denial of Petition for Writ of Habeas Corpus by California Supreme Court, filed January 28, 1997	56a
Order Denying Writ of Habeas Corpus by California Supreme Court, Case No. S010192, filed June 8, 1989	57a
Docket, Case No. S007648, Showing Denial of Petition for Review by California Supreme Court, filed December 22, 1988	58a

IN THE SUPREME COURT OF THE UNITED STATES

No.

CHARLES D. MARSHALL, WARDEN, *Petitioner,*

v.

ROBERT HENRY, *Respondent.*

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT HENRY,	)	No. 05-16947
	)	
Petitioner - Appellant,	)	D.C. No. CV-94-00916-JKS
	)	
v.	)	MEMORANDUM*
	)	
CHARLES D. MARSHALL,	)	
	)	
Respondent - Appellee.	)	
	)	

Appeal from the United States District Court
for the Eastern District of California
James K. Singleton, Chief District Judge, Presiding

Argued and Submitted December 4, 2006
San Francisco, California
Filed March 12, 2007

Before: NOONAN, HAWKINS, and THOMAS, Circuit Judges.

Robert Henry appeals the district court's denial of his petition for habeas corpus. We affirm as to the issue of his *Doyle* rights[1] but remand to the district court for an evidentiary hearing on the uncertified issue of actual innocence. Because the parties are familiar with facts and the procedural history, we will not recount it here.

I

The substantive provisions of AEDPA do not apply to this case. *Phillips v. Woodford*, 267 F.3d 966, 973 (9th Cir. 2001). Under pre-AEDPA habeas review, we presume the correctness of state court factual findings unless the record does not support the findings, or unless other defects, not at issue here, are present. 28 U.S.C. § 2254(d); *Kuhlmann v. Wilson*, 477 U.S. 436, 459-60 (1986); *McKenzie v. Risley*, 842 F.2d 1525, 1531 (9th Cir. 1988) (en banc). Under pre-AEDPA law, we review questions of law and mixed questions of law and fact *de novo*, owing no deference to a state court's legal conclusions. *Williams v. Taylor*, 529 U.S. 362, 400 (2000) (O'Connor, J., concurring) (explaining pre-AEDPA standard of review).

II

Henry's voluntary statements to Officer Bawart waived his right to remain silent. *United States v. Pino-Noriega*, 189 F.3d 1089, 1098 (9th Cir. 1999); *United States v. Ochoa-Sanchez*, 676 F.2d 1283, 1286 (9th Cir. 1982). As in *Pino-Noriega*, there "is nothing in the record to indicate that [Henry's] momentary silence was intended to be a reinvocation of his rights." *Pino-Noriega*, 189 F.3d at 1098. *See also United States v. Lorenzo*,

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1. *Doyle v. Ohio*, 426 U.S. 610 (1976).

570 F.2d 294, 298 (9th Cir. 1978). Moreover, because Henry's statement about the agreed-upon price, and silence as to the contract's purpose, were "arguably inconsistent" with his defense asserted at trial, they may be used to question that defense. *United States v. Makhlouta*, 790 F.2d 1400, 1404 (9th Cir. 1986). *See also United States v. Hoac*, 990 F.2d 1099, 1103-04 (9th Cir. 1993) (defendant's failure to state at arrest that he was an "innocent dupe" was "arguably inconsistent" with the defense presented by his attorney at trial). As a result, Henry's due process rights were not violated by the prosecutor's statements or the jury instruction.

III

Ninth Circuit Rule 22-1(e) permits habeas petitioners to brief uncertified issues using separate headings distinguishing the certified from the uncertified issues. *Schardt v. Payne*, 414 F.3d 1025, 1032 (9th Cir. 2005). "Under this rule, we construe such briefing as a request for an expanded COA," *id.*, and we may grant the COA if the petitioner has made a substantial showing of the denial of a constitutional right. *Hivala v. Wood*, 195 F.3d 1098, 1104 (9th Cir. 1999). We do so here with regard to Henry's actual innocence claim, but decline to grant a COA to Henry's sufficiency of the evidence claim.

Henry seeks an evidentiary hearing on his actual innocence claim. Habeas petitioners must meet "a reasonably low threshold" in order to receive an evidentiary hearing, showing only a colorable claim for relief and the lack of a factual finding below. *Phillips v. Woodford*, 267 F.3d 966, 973 (9th Cir. 2001). Here there is no evidence in the record that Henry received an evidentiary hearing in state court to allow the state court to find facts relevant to the newly-discovered evidence. Henry is entitled to an evidentiary hearing in the district court because if the newly-discovered evidence proves to be true, he would have made out a valid freestanding claim of actual innocence by "affirmatively prov[ing] that he is probably innocent." *Carriger*

v. Stewart, 132 F.3d 463, 476 (9th Cir. 1997); *Herrera v. Collins*, 506 U.S. 390, 417-19 (1993). If truthful, the testimony of Jeffrey Taggart and Charles Austin would prove that Henry, while possibly guilty of solicitation, conspiracy, and attempt for hiring a hit man, is not guilty of first degree murder. We therefore remand to the district court to hold an evidentiary hearing. Each party shall bear its own costs on appeal.

AFFIRMED IN PART AND REVERSED IN PART. REMANDED.

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*This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir.R. 36-3.

Filed May 16, 2007

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT HENRY,	) No. 05-16947
	)
Petitioner - Appellant,	) D.C. No. CV-94-00916-JKS
	)
v.	) ORDER
	)
CHARLES D. MARSHALL,	)
	)
Respondent - Appellee.	)
	)

Before: NOONAN, HAWKINS, and THOMAS, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Filed 01/25/2005

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT HENRY	) Case No. CIV-S-94-0916 (JKS)
	)
Petitioner	) TENTATIVE ORDER
	)
vs.	)
	)
CHARLES D. MARSHALL,	)
	)
Respondent.	)
	)

Robert Henry was convicted in California state court of first-degree murder with special circumstances and sentenced to life imprisonment without the possibility of parole. He exhausted his state judicial remedies and brings this action in federal habeas corpus. 28 U.S.C § 2254. The Court has carefully considered the record and, finding no constitutional error, will deny the petition for habeas corpus.

BACKGROUND

The following facts are taken from the opinion of the California Court of Appeal. The State's theory of the case was that Robert Henry hired Francis Lee Brewer to kill Cedric Turner, whom Henry believed had engineered a robbery of Henry. In attempting to carry out his contract to kill Turner, Brewer mistakenly shot and killed Andre Johnson. The prosecution therefore proceeded on a theory of transferred intent.

Following the robbery of Henry, Henry and two relatives, Jeffrey Taggert and Jester Taggert, met at Henry's house to discuss retaliation. After Henry recounted his tale of having been robbed at gunpoint, the three decided to shoot Turner. In order to carry out the plan, Henry met with Bernard Oden and Oden's friend Brewer. At the meeting, Henry told Brewer that Turner had robbed him of $400 and offered Brewer two "Hubbas" (slang for crack cocaine) to give Turner "a good ass whipping." According to the Court of Appeal, Brewer fully understood the true meaning of appellant's request, i.e., to kill Turner. Brewer immediately went to his girlfriend's house to pick up a .22 caliber sawed-off rifle and ammunition, loaded the gun, placed it in the blue plymouth he had stolen earlier, and drove to Gateway Drive, the prearranged place for the shooting.

At 6:00 p.m. Henry and a relative accosted Turner on Gateway Drive and told Turner that they were going "to take him out," and that he "was gonna die." Henry and his relative then left to meet a second relative and then the three all armed with guns returned to Gateway Drive. Henry confronted Turner a second time, repeating his threat that Turner was going to die. Turner retreated to a nearby driveway. One of Henry's relatives, in Henry's presence, warned the gathering crowd to disperse because "somebody's going to get shot."

Turner fled into a nearby house where he met Andre Johnson. Johnson persuaded Turner to leave saying, "come on, we'll handle it." Johnson offered Turner a ride to Turner's home, and Turner accepted. They left the residence together. Turner entered Johnson's vehicle and sat in the front passenger seat. In the meantime, Johnson and Henry engaged in a shouting match and began to pushing each other. Johnson deprecated Henry's coiffure.

Meanwhile, Brewer and Oden arrived at the scene in the blue plymouth and parked in front of Johnson's car. Brewer got out of the car and stood on the sidewalk observing the argument between Henry and Johnson. Henry walked up to Brewer and pointed out Turner to him saying, "that is the guy."

Thereafter, Brewer, with Oden sitting in the front passenger seat, drove down the street, made a U-turn, and stopped in the middle of the street next to Johnson's car. As one of Henry's relatives shouted "watch out, he is gonna shoot," Brewer leaned across Oden and fired numerous shots out of the passenger window of the car, hitting and killing Johnson who was standing approximately 5 to 10 feet away. In the view of the appellate court, the evidence overwhelmingly demonstrates that at the time of the shooting, Johnson was reaching for the door of his automobile and was facing toward the crowd in the street rather than toward the car from which the shots were coming.

After the shooting, Brewer disposed of the murder weapon, wiped the fingerprints off the blue plymouth, and abandoned the car. Then, accompanied by Oden, he returned to the crime scene to ascertain if the victim had been shot. As a next step, Brewer, Oden, and a third man went to Henry's house on Sawyer street. Brewer and Henry discussed the shooting and Brewer assured Henry that he did not have to worry anymore because he (Brewer) had taken care of the job. Henry told Brewer that he was willing to pay him, but wished to negotiate the price because the wrong person was shot. They agreed that the price would be reduced from $200 to $100. The Court of Appeal found this version of the facts corroborated by Henry's statements to Detective Bawart after Henry's arrest that he, "hired Lee Brewer to kill Cedric Turner. He killed the wrong guy. I can't understand why I am being charged."

SCOPE OF REVIEW

Henry filed his original petition for habeas corpus in federal court on June 2, 1994. Thereafter, he amended his petition on May 20, 1996. The Anti-Terrorism and Effective Death Penalty Act (AEDPA) was enacted on April 24, 1996. A petition filed in district court on or before April 24, 1996, is controlled by pre-AEDPA law. See *Lindh v. Murphy*, 521 U.S. 320 (1997). This is true even when a habeas petition is amended after April

24, 1996. *See Phillips v. Woodford*, 267 F.3d 966, 973 (9th Cir. 2001) (treating amended petition filed after AEDPA's enactment as part of earlier, pre-AEDPA petition and applying pre-AEDPA law); *Keating v. Hood*, 191 F.3d 1053, 1060-61 & n. 7 (9th Cir. 1999) (finding that where petitioner originally filed pre-AEDPA and then amended the petition post AEDPA, pre-AEDPA law governed), *cert. denied*, 531 U.S. 824 (2000), *overruled on other grounds by Payton v. Woodford*, 346 F.3d 1204 (9th Cir. 2003); *Fuller v. Johnson*, 158 F.3d 903, 905 (5th Cir. 1998) *cert. denied*, 526 U.S. 1133 (1999); *Johnson v. United States*, 196 F.3d 802, 805-06 (7th Cir. 1999). Under pre-AEDPA law, a federal habeas court is "limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 68 (1991).

DISCUSSION

This matter was referred to a United States Magistrate Judge. The magistrate filed findings and recommendations, which Judge Damrell adopted. Docket No. 73. These determinations became the law of the case, which this Court may only modify if there has been, (1) an intervening change in the law; (2) an intervening change in the facts; or (3) an intervening determination that the earlier decision was inconsistent with controlling authority from the Untied States Supreme Court or the Ninth Circuit Court of Appeals that existed at the time, but that was overlooked by court and counsel. *See Delta Savings Bank v. United States*, 265 F.3d 1017, 1027 (9th Cir. 2001), *cert. denied sub nom., Kim v. United States*, 534 U.S. 1082 (2002). A number of years have passed since Judge Damrell adopted the magistrate's findings and recommendations. During that time the law has evolved in some significant areas. Where it has evolved, the change in the law will be referenced in the following decision.

Henry advances four claims. First, he argues that the

evidence presented at the trial of Brewer, subsequent to his own trial, resulted in an inconsistent verdict, entitling him to a new trial. Second, Henry asserts that his Fifth Amendment rights were violated by the prosecutor when the prosecutor pointed out at trial that Henry had not denied involvement in his statement to the police and procured a jury instruction on adoptive admissions from silence in the face of accusations. Next, he contends that there was insufficient evidence to prove that he hired Brewer to kill Turner, rather than just to assault him. Finally, Henry submits that he was prejudiced when the prosecutor misstated the evidence. These arguments will be addressed in turn.

I. Evidence Presented At Brewer's Subsequent Trial

Three men were tried as accomplices in the murder of Johnson. Henry was tried first, on the theory that he had hired Brewer to kill Turner, and that Brewer had fired at Turner and killed Johnson in error. The jury accepted this theory, and convicted Henry of first-degree murder. The trial judge found the special circumstances of murder for profit and use of a firearm. Taggert, Henry's cousin, went to trial ten days later and was convicted of second-degree murder for which he received an eight year prison sentence. Two years later Brewer was tried. It appears that Brewer was tried on the same theory that the prosecution followed in trying Henry—that Brewer was hired by Henry to kill Turner, but mistakenly killed Johnson. The jury found Brewer guilty of second- degree murder and specifically rejected enhancements for personal use of a firearm and a financial motive. Henry interprets the evidence at Brewer's trial as establishing that Oden, not Brewer, was the shooter. He argues that Oden had no involvement in any murder for hire and that the shooting of Johnson therefore was unrelated to any quarrel between Henry and Turner. Henry points out that the second jury's failure to find either a firearm enhancement or a financial motive is new evidence that at least

raises a reasonable doubt regarding his culpability.

Henry contends that two decisions of the United States Supreme Court, *Herrera v. Collins*, 506 U.S. 390 (1993), and *Schlup v. Delo*, 513 U.S. 298 (1995), allow a federal court in habeas to entertain an untimely motion for new trial based on newly discovered evidence, i.e., a stand alone claim of "actual innocence" based on newly discovered evidence. Both of the cases Henry points to are capital cases. In Henry's case, the prosecutor made it clear from the outset that the death penalty would not be sought. Henry argues, however, that it is unreasonable to permit federal review where the penalty is death, and deny it where the penalty is life imprisonment without the possibility of parole. He notes that he was 19 years old at the time of his conviction and of limited intelligence. For purposes of this case the Court will assume that the *Herrera/Schlup* rules apply to non-capital cases. *See, e.g., Sistrunk v. Armenakis*, 292 F.3d 669, 673 n. 3 (9th Cir. 2002) (assuming *arguendo* that *Schlup* applies to non-capital cases).

Schlup addresses a claim of actual innocence as a predicate for asserting a defaulted constitutional claim in a successive or abuse habeas petition. A *Schlup* actual innocence claim is procedural—a means of obtaining the court's attention to a defaulted claim where the petitioner cannot show cause plus prejudice and excuse the default. *See McCleskey v. Zant*, 499 U.S. 467, 487 (1991). A majority of the Court in *Schlup* concluded that a sufficient showing of actual innocence could substitute for a showing of cause plus prejudice, and excuse a prior procedural default allowing a federal court to consider a second habeas petition. The *Schlup* Court then addressed the showing that a petitioner would have to meet in order to pass through this procedural "gateway" and obtain consideration of his defaulted constitutional claims. In *Schlup* the Court considered whether the petitioner's burden of proof was the one established in *Sawyer v. Whitley*, 505 U.S. 333 (1992), or that announced in *Murray v. Carrier*, 477 U.S. 478 (1986). In *Sawyer*, the Court found that it must be shown by clear and

convincing evidence that but for a constitutional error no reasonable juror would have found the petitioner eligible for the death penalty. In *Murray*, the Court established that a petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the newly discovered evidence. The *Schlup* Court distinguished a third standard articulated in *Jackson v. Virginia*, 443 U.S. 307 (1979) (questioning whether, in light of the evidence, any rational juror could have found the defendant guilty beyond reasonable doubt). Under the *Schlup* standard, a federal trial judge must consider the credibility of witnesses who testified at trial and whose affidavits provide the alleged newly discovered evidence. In contrast under the *Jackson* standard the reviewing court does not make credibility determinations. Further, under *Jackson* the focus is on the whether the jury "could" find guilt beyond reasonable doubt. Under *Carrier*, the use of the word "would" focuses the inquiry on the likely behavior of a hypothetical trier of fact. Under both *Sawyer* and *Carrier* the Court concluded that a petitioner's showing of innocence is not insufficient solely because the trial record contained sufficient evidence to support a jury's verdict. *Schlup*, 513 U.S. at 331-32.

In contrast to *Schlup*, *Herrera* presents a substantive, or stand-alone claim. The claim is considered independently and not a justification for excusing prior procedural defaults. The petitioner does not claim innocence in order to avoid a procedural default so that he may argue separate constitutional claims. Rather, he seeks relief solely on the basis of his claim of innocence. While the precise standard has not been developed to the point that the *Schlup* standard has, it is clear that the hurdle a petitioner must cross is much higher than that required to avoid a procedural default. The Ninth Circuit has interpreted *Herrera* as requiring a petitioner to affirmatively prove his innocence—not just raise doubts about his guilt in order to prevail on a stand-alone claim. *Carriger v. Stewart*, 132 F.3d 463, 476-77 (9th Cir. 1997) (en banc), *cert. denied*, 537 U.S. 1133 (1998).

In this case Henry has four claims, but none of them was procedurally defaulted. He thus does not need to pass through the *Schlup* gateway to assert any of his claims. Consequently, his actual innocence claim must be viewed under the *Herrera/Carriger* standard. It is clear that Henry cannot meet that standard. His admission to officer Bawart is fatal to this claim. Bawart testified that Henry told him, "I hired Lee Brewer to kill Cedric Turner. He killed the wrong guy. I can't understand why I am being charged." Henry seeks to avoid this result by arguing that Bawart is hard of hearing, that Henry is soft spoken, and that what Henry really said was, "[i]f I had hired Francis Brewer to kill Cedric Turner, and he got the wrong guy, I don't know why I am being charged." Docket No. 39, Ex. B at 5 (Decl. of Henry). Unfortunately for Henry, his after the fact explanation is not worthy of belief. Henry's recorded interview was presented to the jury to corroborate Bawart's testimony regarding Henry's admissions. *See Doe v. Menefee*, 391 F.3d 147, 164-65 (2d Cir. 2004) (reversing a district court's finding that testimony of the defendant and other witnesses constituted reliable evidence of actual innocence as clearly erroneous in light of the defendant's prior statements and admissions). Henry has not affirmatively proved that it is more probable than not that he was not an accomplice to the murder of Johnson under the theory of transferred intent. The belated testimony of Taggert, Henry's brother, and Charles Austin, a convicted felon, do not persuade the Court that Henry is probably innocent.

The State correctly points to a number of cases in which the Supreme Court and the Ninth Circuit have held that inconsistency between verdicts does not create due process problems. *See, e.g., United States v. Powell*, 469 U.S. 57 (1984); *Dunn v. United States*, 284 U.S. 390 (1932); *United States v. Hart*, 963 F.2d 1278 (9th Cir. 1992). Since Henry was tried first, there are no collateral estoppel or res judicata problems from any inconsistent findings by the jury that tried Brewer two years later. *See, e.g., Ashe v. Swenson*, 397 U.S.

436 (1970) (discussing possible res judicata effects of inconsistent verdicts). It is true that some courts have distinguished *Powell* by shifting attention from the verdicts reached by sequential juries, and the prosecutor's knowledge and intent in trying more than one person for acts against a single victim. These cases appear related to decisions that invoke judicial estoppel to prevent a litigant from arguing one theory to a forum and obtaining a favorable result and then arguing an inconsistent theory to an alternate forum. *See, e.g., Russell v. Rolfs*, 893 F.2d 1033, 1036-37 (9th Cir. 1990).

A number of courts have found a due process error cognizable in federal habeas corpus where a state prosecutor uses inconsistent theories, arguments, and evidence to prosecute co-defendants in separate trials for the same crime. *See, e.g., Jacobs v. Scott*, 513 U.S. 1067 (1995) (Mem.) (Stevens and Ginsburg, JJ, dissenting from denial of certiorari); *Nguyen v. Lindsey*, 232 F.3d 1236 (9th Cir. 2000); *Shaw v. Terhune*, 353 F.3d 697 (9th Cir. 2003), *opinion amended and superceded by* 380 F.3d 473 (9th Cir. 2004). There is support for this proposition in other circuits as well. *See, e.g., Stumpf v. Mitchell*, 367 F.3d 594 (6th Cir. 2004) *cert. granted*, 2005 WL 32977 (U.S. January 7, 2005); *Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000). There is also opposing authority. *See Nichols v. Scott*, 69 F.3d 1255 (5th Cir. 1995); *Jacobs v. Scott*, 31 F.3d 1319 (5th Cir. 1994); *see also United States v. Paul*, 217 F.3d 989, 998-99 (8th Cir. 2000) (precluding inconsistent evidence but allowing inconsistent arguments or theories).

Nguyen and *Shaw* are post-AEDPA cases that provide little support for Henry. The prosecutor tried first. The theory of transferred intent was the same in both cases and the same enhancements were argued. The evidence presented by the prosecutor was essentially the same, though new witnesses were called by the defense. If there is inconsistency it is in the respective jury verdicts, not in the prosecution's theory of the case. Under the circumstances there was no due process violation or was there a proper basis for invoking judicial

estoppel.

II. Adoptive Admissions From Silence In The Face Of Accusations And the Right To Remain Silent

It does not appear that Henry objected at trial to the prosecutor's statements in argument. Nor does it appear that Henry objected to the jury instruction on adoptive admissions that he challenges in this proceeding. Had this matter occurred in federal court, Henry would need to show plain error in order to prevail.

Henry did not testify at his trial. During the course of the trial, a detailed statement from Henry in the form of questions put to him by police officers and his answers was presented to the jury. The statement was in large part recorded and a transcript was prepared. In addition to the recorded statement, Officer Bawart testified that after the tape recorder was turned off, and Henry was informed that he was going to be booked for murder, Henry remarked, "I hired Lee Brewer to kill Cedric Turner. He killed the wrong guy. I can't understand why I'm being charged." Vol. III, Ex. B, Part 2 at 405. Officer Ronald Becker, who was also present, confirmed this testimony in part. He testified that Henry said, "He couldn't under stand why he was going to jail for murder because the guy he had hired had shot the wrong person." In closing argument defense counsel stressed that the alleged admission did not occur during the part of the interrogation that was recorded and argued that Becker's recollection was probably more accurate than Bawart's because Bawart was hard of hearing and his notes, which quoted the statement, referred to it as similar to what Henry said and not almost verbatim, as Bawart had testified at trial. Defense counsel tried to persuade the jury that what Henry had really meant, consistent with the defense theory of the case, was that he had hired Brewer to beat up Turner, and Brewer (or Oden) had shot Johnson. In his final rebuttal argument the prosecutor addressed this issue as follows:

> Last but not least, of course, is the Defendant's statement. You've got it on tape, and I want you to listen to it. I won't tell you everything about it, but there's things the court will tell you.
> One of those things is, if you are confronted with the facts that you have committed a crime, and you sit there and don't say, "Hey, I didn't do it" you can take that into consideration; if you sit there and kind of mealy-mouth around and don't really answer questions and this number (demonstrating) all that can be taken into account in deciding whether or not how much emphasis you'll place on that particular statement that he gives the police, and whether or not there's a confession of guilt, whether or not when you run away to Richmond to leave the scene that's consciousness of guilt. That is up to you.

Id. at 516. The prosecutor then referred to the following portion of the recorded interrogation:

> Bawart: so you offered him $200 to shoot Ced?
> Henry: No.
> Bawart: That's a lie.
> Henry: I didn't offer hm $200.
> Bawart: How much did you offer him?
> Henry: I offered him $50.

Id. at 517. After referring to this portion of the tape, the prosecutor continued:

> Well Ladies and Gentlemen, when you listen to that tape, its there, and I want you to listen to it. He's not upset over the fact the officer is saying 'You hired this man to shoot somebody.' He's upset because he didn't offer him $200, he offered him $50. . . . [U]se common sense. If you were in that situation, you're being accused of a crime, you're being accused of murdering somebody or being involved

> in murdering somebody, wouldn't you say, "Hey, I didn't contract to shoot him," or would you be worried about how much you were going to pay him unless you had this contract and you were going to pay him. . . . I'll tell you this, basically. The defense argument is, ignore what the defendant told the police. He attacks Detective Becker and Bawart, saying they didn't write in their report the argument over "similar" or "verbatim." You heard the detective's testimony. You have seen what was read in the report. He made the statement which was similar to, "I hired Lee Brewer to kill Mr. Turner. He killed the wrong guy. I can't understand why I am being charged." The defense attorney wants you to ignore that tape and statement. I submit to you, that statement alone is enough to convict the Defendant as charged.

Id. at 518.

Shortly thereafter the jury was carefully instructed regarding alleged confessions and admissions by Henry and that it could consider an inference of consciousness of guilt from flight in order to avoid prosecution. *Id.* at 528. Among the instructions was the following:

> If you should find from the evidence that there was an occasion when the Defendant, under conditions which reasonably afforded him an opportunity to reply, failed to make a denial or made false, evasive, or contradictory statements in the face of an accusation expressly directed to him or in his presence charging him with the crime for which he is now on trial or tending to connect him with its commission, and if you should find that he heard the accusation and understood its nature, the circumstances of his silence or conduct on that occasion may be considered against him as indicating an admission that the accusation thus made was true.
>
> Evidence of such an accusatory statement is not received

> for the purpose of proving its truth, but only as it supplies meaning to the silence and conduct of the accused in the fact of it; and unless you should find that his conduct at the time indicated an admission that the accusatory statement was true, you should entirely disregard the statement.

Id at 529.

Henry argues that the prosecutor's statement constituted a comment on Henry's decision to invoke his Fifth Amendment rights. The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The government may not burden this right by commenting before the jury on a defendant's election not to testify. *Griffin v. California*, 380 U.S. 609 (1965); *see also Mitchell v. United States*, 526 U.S. 314 (1999) (extending *Griffin* to sentencing). The Supreme Court has held that there is an implicit promise in the Miranda warnings that silence will not be used against a defendant and a defendant is denied due process when a prosecutor seeks to impeach a defendant's exculpatory story at trial with post-arrest, post-Miranda warning silence. *Doyle v. Ohio*, 426 U.S. 610 (1976). In *Doyle*, the Court reasoned that the Miranda warnings may have induced the defendant to remain silent. In the absence of Miranda warnings there can be no inducement. A prosecutor may rely on pre-arrest silence for impeachment, *Jenkins v. Anderson*, 447 U.S. 231, 238-39 (1980), and post-arrest pre-Miranda silence for impeachment, *fletcher v. Weir*, 455 U.S. 603, 607 (1982).

Jenkins and *Fletcher* are inapplicable to this case because Henry received Miranda warnings, apparently waived them, and gave a fairly complete statement. His case more closely resembles *Anderson v. Charles*, 447 U.S. 404 (1980). In *Anderson* the Supreme Court held that where Miranda warnings are given and waived, and a defendant makes a statement and then testifies to an arguably inconsistent version of the facts at trial, he may be impeached not only with what he said in his

post-Miranda statement but with what he failed to say. *See also United States v. Pino-Noriega*, 189 F.3d 1089 (9th Cir. 1999); *United States v. Hoac*, 990 F.2d 1099, 1004 (9th Cir. 1993); *United States v. Makhlouta*, 790 F.2d 1400, 1403 (9th Cir. 1986); *United States v. Ochoa-Sanchez*, 676 F.2d 1283, 1286 (9th Cir. 1982).

A fair reading of the prosecutor's rebuttal argument indicates that he was responding to defense counsel's attack on Bawart's testimony regarding Henry's admission. The prosecutor was also attempting to show that Henry's recorded answers to Bawart's questions corroborated Bawart's testimony regarding the alleged admission that was not recorded. It is true that a number of the cases permitting a prosecutor's use of omissions in a defendant's post-Miranda, post-arrest statements for impeachment involve situations where a defendant testifies to an inconsistent exculpatory story. The Ninth Circuit has expanded the exception to the *Doyle* rule to include cases like this one, where a defendant does not testify, but the defense presented by his attorney is inconsistent with the defendant's pretrial post Miranda statements. *Hoac*, 990 F.2d at 1104 (stating that the *Charles* exception to the *Doyle* rule applies even when a defendant does not testify at trial) (citing *Anderson v. Charles*, 447 U.S. 404 (1980) (per curium), and *Klepper v. United States*, 331 F.2d 694, 701 (9th Cir. 1964)). Here, the prosecutor did not impermissibly comment on Henry's exercise of his Fifth Amendment rights.

Henry points out that in addition to the prosecutor's rebuttal argument, the jury was instructed on admissions by silence, or adoptive admissions. The instruction is set out above. The final sentence of the instruction is problematical in a case where the alleged adoptive admissions occurred during interrogation by police officers. The final sentence reads, "if you should find that [Henry] heard the accusation and understood its nature, the circumstances of his silence and conduct on that occasion may be considered against him as indicating an admission that the accusation thus made was true."

Vol. III, Ex. B, Part 2 at 529.

It is arguable that the *Charles* exception to *Doyle* only applies where questions to the defendant are "not designed to draw meaning from silence, but to elicit an explanation for a prior inconsistent statement." *Charles*, 447 U.S. at 409. To use silence in response to interrogation as substantive evidence as the instruction suggests may put an impermissible burden on the exercise of constitutional rights. It is not necessary to pursue this issue further, however, for even if error occurred it was harmless beyond reasonable doubt. The only mention that the prosecutor made of the instruction was in conjunction with his argument tying Henry's recorded admissions to the alleged unrecorded admission to which Bawart testified. Any error in giving the adoptive admissions instructions did not have a substantial and injurious effect or influence on the jury's verdict. *See Brecht v. Abrahamson*, 507 U.S. 619 (1993).

III. Sufficiency Of The Evidence

Henry argues that while there was substantial evidence that he hired Brewer to assault Turner, there was no evidence that he paid Brewer to kill Turner. The evidence of Henry's contract with Brewer must be considered in context with Henry's admissions to the police. These admissions provide substantial evidence from which a reasonable jury could find guilt beyond reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307 (1979).

IV. Prejudicial Error

Henry argues that the prosecutor committed prejudicial error when he speculated that Henry and Brewer modified their agreement to substitute $200 for the quantity of cocaine originally promised in return for an assault on Turner. The comment did not draw an objection. Defense trial counsel obviously felt that the comment was within the range of the

evidence. *See United States v. Gray*, 876 F.2d 1411, 1417 (9th Cir. 1989) *cert. denied*, 495 U.S. 930 (1990). A prosecutor's improper remarks do not by themselves violate a defendant's constitutional rights; they only do so when they render the proceedings fundamentally unfair. *Jeffries v. Blodgett*, 5 F.3d 1180, 1191 (9th Cir. 1993), *cert denied*, 510 U.S. 1191 (1994); *Davis v. Woodford*, 384 F.3d 628, 644 (9th Cir. 2004) (quoting *Darden v. Wainwright*, 477 U.S. 168 (1986)). Henry's claim does not satisfy this test.

IT IS THEREFORE TENTATIVELY ORDERED:

A decision in this case has been delayed a long time. while this case has been pending numerous decisions of the Ninth Circuit and United States Supreme Court have been reached. This decision will stand as the tentative decision on Henry's application for habeas corpus at docket no. 39. Either party may file a legal memorandum responding to this tentative decision on or before **Monday, April 4, 2005**. the opportunity to file a supplemental brief shall be in lieu of oral argument. The Court will promptly reach a final decision after the time for supplemental briefing has expired.

Robert Henry's motion for post conviction relief, 28 U.S.C. § 2254 is **TENTATIVELY DENIED.** The clerk will be instructed to prepare a judgment dismissing this claim with prejudice. Although Henry's petition was filed pre-AEDPA, the United States Supreme Court has held that AEDPA's provisions regarding certificates of appealability apply to all cases where the notice of appeal is filed after AEDPA's effective date. *Slack v. McDaniel*, 529 U.S. 473, 482 (2000); *see also Phillips v. Woodford*, 267 F.3d 966, n.2 (9th Cir. 2001). Therefore, the Court will need to determine whether Henry should be given a certificate of appealability. 28 U.S.C. § 2253. The Court is satisfied that reasonable jurists would not disagree regarding the merits of Henry's claims 1, 3 and 4. No certificate shall issue as to those claims. Henry's second claim presents a closer question. The Court will therefore issue a certificate of

appealability as to the question of whether the prosecutor's discussion of Henry's statement to the police and the instruction on adoptive admissions denied Henry due process of law and prejudiced him under the *Brecht* standard.

Dated at Anchorage, Alaska, this 24 day of January 2005.

s/_____
JAMES K. SINGLETON, JR.
United States District Judge

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,	)	
	)	A035447
Plaintiff and Respondent,	)	
	)	(Super. Ct. No. 19726
v.	)	County of Solano)
	)	
ROBERT HENRY,	)	
	)	
Defendant and Appellant.	)	
	)	

Defendant Robert Henry (appellant) appeals a judgment imposing life without the possibility of parole following his conviction for first degree murder with special circumstances.

I. FACTS

The conviction at bench grew out of the killing of Andre Johnson who was shot from a passing car driven by Francis Lee Brewer (Brewer), a hired killer. The murder took place on Thanksgiving Day, 1985, in the vicinity of Country Club Crest in northern Vallejo and involved numerous members of the Henry and Taggart families, including appellant, his brothers Gary and John Henry, Jeffrey Taggart, and his cousins, Jester and Alex Taggart (hereafter; Jeffrey, Jester and Alex, respectively). Stated most favorably to respondent as it must

(*People v. Johnson* (1980) 26 Cal.3d 557, 576; *People v. Mosher* (1969) 1 Cal.3d 379, 395, disapproved on other grounds in *People v. Ray* (1975) 14 Cal.3d 20,30-31) the evidence reveals the following scenario.

At about 3 a.m. on November 28, 1985, Cedric Turner, the intended victim of the crime (hereafter: Turner), stood at the corner of Gateway and Rounds Streets in the Country Club Crest area in Vallejo. Wyatt Shellmon came along in his car and asked Turner if he could get some "base rocks"[2/] for him. After a yes answer, Shellmon picked up Turner and drove him to Sawyer Street to contact appellant who was selling cocaine. Moments later, appellant got into Shellmon's car. All three were heading towards the end of an isolated cul-de-sac in a remote area of the city. Shellmon suddenly stopped, pulled a gun and pointing it at appellant said, "Give me everything you have or I'll blow your head off." Appellant complied by giving up $30 in cash and some cocaine. Shellmon then ordered appellant out of the car and shortly thereafter dropped off Turner as well.

Following the robbery, appellant, Jeffrey and Jester met at appellant's house to discuss retaliation against Turner. After hearing appellant's recount that Turner had robbed him by putting a gun at his head, they unanimously decided to shoot (get) Turner.

For the apparent purpose of carrying out the plan, appellant during late afternoon arranged a meeting with Bernard Oden and the latter's friend, Brewer. At the meeting which took place in his house, appellant complained that he had been robbed of $400 at gunpoint and offered two "hubbas" (rock cocaine) to Brewer to give Turner "a good ass whipping." Brewer fully understood the true meaning of appellant's request. Immediately following the discussion, Brewer went to his girlfriend's house on Stella Street, picked up a .22 caliber sawed-off rifle and ammunition, loaded the gun with bullets,

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2. "Base rock" is a street term for cocaine.

placed it in the blue Plymouth he had stolen earlier and took off to Gateway Drive, the scene of the shooting.

Around 6 p.m. that evening, appellant and Jester confronted Turner on Gateway Drive and told him they were going to "take him out" and he "was gonna die." The duo then left and returned with Jeffrey, all three carrying guns. Appellant came face to face with Turner and repeated his threat that Turner was going to die. By now a crowd had gathered and Turner retreated to the driveway of the Morgan resident at Gateway. Jester, with appellant standing close by, urged the crowd to move because "somebody's going to get shot."

Turner fled inside the house. Andre Johnson was also there and after listening to Turner's description of what was going on said: "Come on, we'll handle it" and offered to give Turner a ride home. They walked outside together. As Turner walked over to Johnson's car and occupied the front passenger seat, the crowd asked Johnson why he was helping Turner, instead of letting him fight his own battles. Johnson threatened them back shouting that he and his brother would come back and tear up the place. Simultaneously Johnson and appellant were yelling and pushing each other; Johnson called appellant "wave set" an obvious slur on appellant's permed hair.

Meanwhile, Brewer and Oden arrived at the scene in the blue Plymouth and parked in front of Johnson's car. Brewer got out of the car and stood on the sidewalk observing the argument between appellant and Johnson. Appellant walked up to Brewer and pointed out Turner to him by saying: "That's the guy."

Thereafter, Brewer, with Oden as his passenger sitting in the front seat, drove down the street, made a U-turn and slowed down or stopped in the middle of the street next to Johnson's car. As Jester yelled "watch out, he's gonna shoot" Brewer leaned across Oden and fired numerous shots out of the passenger window of the car hitting and killing Johnson who was standing approximately 5 to 10-feet away. The evidence overwhelmingly demonstrates that at the time of the shooting Johnson was reaching for the door of his automobile and was

facing toward the crowd in the street rather than the blue car from which the shots were coming.

After the shooting, Brewer disposed of the murder weapon, wiped the fingerprints off the blue Plymouth and abandoned the car. Then, accompanied by Oden, he returned to the crime scene to ascertain if the victim had been shot. As a next step, Brewer, Oden and Jeffrey went to appellant's house on Sawyer Street. In the ensuing discussion, Brewer assured appellant that he had taken care of the job and that appellant did not have to worry any more. Appellant indicated that he was willing to pay but added since Brewer had killed the wrong man, the original price would be reduced in half from $200 to $100.[3] The fact that the Johnson killing occurred as a result of an agreement to kill Turner, was further corroborated by appellant himself. The record reflects that after his arrest for the Johnson homicide appellant stated to Detective Bawart: "I hired Lee Brewer to kill Cedric Turner. He killed the wrong guy. I can't understand why I'm being charged."

The thrust of appellant's defense was that Brewer killed Johnson based on an independent motive. Under this hypothesis, since Brewer did not mistakenly or inadvertently shoot Johnson while intending to shoot Turner, the doctrine of transferred intent could not be applied to convict appellant. In

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3. The pertinent part of the record reads as follows: "Q. What happened the second time you'd been there now after the shooting what took place? [¶] A. Just - - Lee told - - Lee Francis [Brewer] told him, Robert Henry that, uh, he had tooken care of that. [¶] Q. And what was said to him by Mr. Henry? [¶] A. He told him that he didn't have that right now, but he could come back later and he would give it to him. [¶] Q. Then what happened? [¶] A. Uh, shortly after that, asked exactly what happened. He said, 'You don't have to worry about him no more.' [¶] Q. Who asked that" [¶] A. He asked Lee. [¶] Q. When you say 'he,' who are you referring to? [¶] A. Robert Henry. [¶] Q. Asked him what? [¶] A. Exactly what had happened, and Lee told him, replied to him, 'Well, you don't have to worry about him no more. . . .'" [¶] Q. And did they discuss the payment? [¶] A. Yes. They indicated that, because he had hit-shot the wrong man, that he was only going to pay half of the moneys; instead of paying $200, he was going to be paid only 100." (Emphasis added.)

support of this theory a defense criminalist testified that the angles and the bullet trajectories indicated that Johnson was the intended target and that he was struck while on the ground or falling towards the ground. The defense also examined a psychologist who administered an "I.Q." test to appellant. According to his testimony, appellant's "I.Q." was at 75 which constitute borderline mental deficiency.

Based upon the foregoing evidence, appellant was convicted of first degree murder (Pen Code,[4] § 187) under the theories of aider and abettor and transferred intent. The jury found the special circumstance allegation of intentional murder for financial gain (§ 190.2, subd. (a)(1)) and the firearm use allegation (§ 12022, subd. (a)) to be true. Appellant's motion for a new trial and/or to dismiss the special circumstance finding was denied, and he was sentenced to life imprisonment without possibility of parole.[5] Appellant raises numerous issues on appeal which are discussed below.

II. GUILT PHASE ISSUES

A. Sufficiency of the Evidence

Appellant's first contention on appeal is that the judgment of conviction is unsupported by substantial evidence because (a) the record fails to sustain that he intended to kill Turner, and (2) the evidence is insufficient to establish that he could reasonably foresee that Brewer would shoot someone for personal reasons. We disagree.

Since appellant was not the perpetrator of the killing, his culpability rests on his status as an aider and abettor. Under well-settled law, in order to insure criminal liability an aider and

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4. Unless otherwise indicated, all statutory references are to the Penal Code.

5. The district attorney stated at the outset of trial that "they will not be seeking the death penalty.

abettor must act with knowledge of the criminal purpose of the perpetrator and with an intent of either committing or encouraging or facilitating the commission of the offense. (*People v. Yarber* (1979) 90 Cal.App.3d 895, 915-916; *People v. Vasquez* (1972) 29 Cal.App.3d 81, 87.) As far as the intent element of the crime goes, the aider and abettor must share the specific intent of the perpetrator. The shared intent exists when, acting with knowledge of the full extent of the perpetrator's criminal purpose, the accomplice aids and encourages the perpetrator with intent of facilitating the crime. (*People v. Beeman* (1984) 35 Cal.3d 547, 560.) It is likewise settled that the liability of an aider and abettor extends also to the natural and reasonable consequences of the acts he knowingly and intentionally aids and encourages. (*Ibid.*; *People v. Beltran* (1949) 94 Cal.App.2d 197, 207.)

As a further preliminary matter, we also set out the rules governing the stand of review regarding the sufficiency of the evidence of a criminal conviction. It is well established that the appellate court must view the evidence in the light most favorable to respondent and presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Mosher, supra*, 1 Cal.3 at p. 395.) If the facts reasonably justify the trier of fact's findings the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment. (*People v. Robillard* (1960) 55 Cal.2d 88, 93; *People v. Reilly* (1970) 3 Cal.3d 421, 425.) The test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt. (*People v. Wright* (1985) 39 Cal.3d 576, 591; accord *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) As summarized in *People v. Johnson, supra*, 26 Cal.3d at p. 578, the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses such substantial evidence that a reasonable trier of fact could find the defendant guilty beyond a reasonable

doubt.

In the case at bench there is substantial (if not conclusive) evidence that appellant intended to kill Turner and that Brewer, the perpetrator of the crime, carried out the shooting upon a prior agreement, with the full knowledge and encouragement of appellant.

Appellant's intent to kill Turner is demonstrated by a host of evidence. Following the robbery appellant, Jeffrey and Jester met in Jeffrey's house where they decided to shoot Turner because of his participation in the holdup. Prior to the afternoon shootout, there were three confrontations between Turner and appellant and his friends (Jeffrey and Jester). On all three occasions appellant and his companions explicitly threatened Turner with death by repeating that he was going to die and/or he was going to be taken out.[6/] At one point they were armed, but they did not use their weapons because as Jeffrey later told the police "they had what's his name to do it, Brewer."

Furthermore, appellant's intent to kill Turner as well as his knowledge and encouragement of the killing are conclusively

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6. Excerpts from Turner's testimony: [¶] "Q. Did you have any problems with anybody on Gateway Drive about that day that time? [¶] A. Yes, I did. [¶] Q. Who did you have problems with? [¶] It was Robert Henry, Jester Taggart, Jeffery Henry and Alex Taggart. [¶] Q. Where were you when this first started to occur, this problem?. [¶] A. On Gateway and Rounds Street. [¶] Q. Who did you have contact with first? [¶] A. Robert Henry and Jester Taggart. [¶] Q. And did you engage with them in a conversation? [¶] A. Yes, I was trying to, yeah. [¶] Q. And what did - - what did Mr. Henry tell you? [¶] A. He told me that I was gonna die; he didn't want to hear it. [¶] Q. Excuse me. I didn't hear the last part. [¶] A. He said he didn't want to hear it, that I was going to die. [¶] Q. What was he - - did you say something to him? [¶] A. Yeah, I told him I wanted to talk to him. [¶] Q. About the incident? [¶] A. Yes, I did. [¶] Q. And he said he didn't want to hear it? [¶] A. Yes. [¶] Q. Did Jester Taggart say anything to you? [¶] A. No, he just kept on saying that I was going to die. [¶] Q. They both said that to you? [¶] Yeah. . . ." [¶] Q. Did they make any threats to you while they had the guns? [¶] A. Uh, yes, they told me that I was going to die. [¶] Q. They continued to tell you that you were going to die? [¶] A. Over and over, yes. [¶] Q. And who specifically said that? [¶] A. Robert Henry." (Emphasis added.)

established by his agreement made with Brewer. While Oden testified that appellant offered rock cocaine to Brewer to give Turner only a "good ass whipping" the record as a whole, including appellant's statement to the police, indicates that the agreement at issue was in effect a contract for killing.

The above proposition is sustained by a wealth of evidence. To recall, right after the discussion with appellant, Brewer picked up ammunition and a rifle and drove to the scene of the crime. While there, appellant pointed out Turner to him as the intended victim. After the shootout, Brewer returned to the scene to ascertain if the victim had been shot. Thereafter, he met with appellant, advised him that he took care of the problem and demanded the agreed upon price for the job. Appellant retorted that Brewer had killed the wrong man and therefore reduced his fee to half of the agreed amount. Last, but not least, appellant himself admitted to the police: "I hired Lee Brewer to kill Cedric Turner." In light of this record appellant's contention that the evidence was insufficient to show his knowledge of Brewer's criminal purpose and the requisite shared intent to encourage and facilitate Brewer's criminal objective, is hollow indeed and must be firmly rejected.

Appellant's argument that the alternative theory of aiding and abetting is not supported by sufficient evidence inasmuch as he could not reasonably foresee that Brewer would kill anybody much less that he could kill a third person, also fails. The intentional and knowing aiding and promoting Brewer's criminal purpose by itself is sufficient to sustain the conviction and renders the alternative theory of appellant's criminal liability inconsequential. Moreover, appellant's assertion is predicated upon the false premise that the agreement in dispute called for merely beating up rather than killing Turner and that appellant was unaware of Brewer's criminal design to kill. As discussed above, this premise is unsupported by record. Furthermore, the liability of an aider and abettor is not limited to the intended crime, but extends also to the natural and reasonably foreseeable consequences of any acts he knowingly

and intentionally aids and promotes. (People v. Beeman, supra, 35 Cal.3d at p. 560.) As the agreement at bench called for an outright killing rather than just a beating, the shooting with the resultant death of a human being (including a passerby or other incidental victim) was entirely foreseeable.

B. Alleged Evidentiary Errors

(1) Exclusion of Prior Crimes: Appellant sought to introduce evidence of prior criminal conduct by Brewer for the purpose of showing that "'he had an explosive personality and was likely in a confrontational situation to become enraged and strike out at otherwise innocent persons." Specifically, appellant offered to prove that approximately 23 days before the Johnson killing, Brewer committed an armed robbery; during the commission of that crime the victim, a 66-year-old man, took a swing at Brewer and swore at him, and Brewer became so incensed that when the man turned and started to walk away, he shot him in the back. Appellant insisted that the proffered evidence tended to prove that Brewer did not kill Johnson by mistake or inadvertence, but rather harbored an independent motive which foreclosed the applicability of the transferred intent and foreseeable consequence doctrines to this case. After a hearing the trial court ruled that the proffered evidence was inadmissible because the two situations were different and that the evidence was excludable under Evidence Code section 352 as well, inasmuch as its probative value was outweighed by its prejudicial effect.[7] Appellant argues that the exclusion of the

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7. The trial court explained its ruling as follows: "As far as I can determine from the evidence, and you did go over it again, the swearing was directed at people in general. Mr. Oden put Mr. Brewer as one of the more distant individuals in this crowd of some 50 around Mr. Johnson and the scene. That is far, far different from the situation where there's a one-on-one, an attempted assault, very much directed swearing and flight. It is so far distant that, certainly under 352 of the Evidence Code, I feel that its relevance, if any, is far outweighed by the prejudice that it would engender by introducing that evidence."

prior crime was prejudicially erroneous because (1) the proffered evidence was admissible under Evidence Code section 1101, subdivision (b), in order to show motive and intent; and (2) the trial court erred in applying Evidence Code section 352 to exclude evidence which has been made admissible under section 1101, subdivision (b), of the Evidence Code. Neither of these contentions has any merit.

Evidence of other crimes is inadmissible under the statute unless it is relevant to prove some fact other than the person's propensity to commit the crime. (Evid. Code, § 1191.)[8/] The case law teaches that before permitting the jury to hear evidence of other offenses, the court must ascertain whether that evidence is relevant (i.e., whether it tends logically, naturally and by reasonable inference to prove the issue upon which it is offered). (Evid. Code, § 210; People v. Thompson (1980) 27 Cal. 3d 303; 316; People v. Peets (1946) 28 Cal.2d 306, 315.) In determining relevance the "court must look behind the label describing the kind of similarity or relation between the other offense and the charged offense; it must examine the precise elements of similarity between the offenses with respect to the issues for which the evidence is proffered.. . . ." (People v. Schader (1969) 71 Cal.2d 761, 775; People v. Thompson, supra, 27 Cal.3d 303.) Furthermore, if the connection between the uncharged offense and the ultimate fact (which is intended to be proved) is not clear, the evidence should be excluded. (People v. Durham (1969) 70 Cal.2d 171, 186-187, see also

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8. Evidence Code section 1101 provides in relevant part: "(a) Except as provided in this section and in Sections 1102 and 1103, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or hr conduct on a specified occasion. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence or mistake or accident . . .) other than his or her disposition to commit such n act.")

People v. Sam (1969) 71 Cal.2d 194, 203.)

The above cited principles are applicable where, as here, the evidence of another offense is offered to prove intent or motive. As stated in Thompson: "It has been assumed on occasion that a showing of substantial similarity is not required if intent is the material fact sought to be proved by the introduction of an uncharged offense. This assumption is too broad. It is correct only when the similarity of offenses is irrelevant to the chain of inference sought to be drawn between the uncharged offense and the fact of intent in the charged offense. . . . [¶] However, similarity is often necessary to bridge the gap between other crimes evidence and the material fact sought to be proved." (People v. Thompson, supra, 27 Cal.3d at p. 319, fn. 23.)

It follows that in the case at bench the trial court properly analyzed the similarities between the Johnson killing and the prior robbery and, in light of the evidence, correctly concluded that due to the vast discrepancies between the two offenses the other crime evidence was inadmissible to prove the intent or motive of the perpetrator. Significantly enough, the evidence at bench unmistakably shows that there was no personal confrontation or argument between Johnson and Brewer prior to the shooting. The witnesses testified that Brewer stood on the sidewalk some distance away and that Johnson was quarreling with the crowd and appellant, rather than Brewer. For example, Oden recalled that Johnson was very upset and was arguing with the whole crowd and that the cursing and exchanging angry words took place between Johnson and the crowd, rather than between Johnson and a specific person or persons. Gary Henry, another witness, also confirmed that Johnson was yelling at everyone. Jeffrey likewise observed that the argument was between appellant and Johnson, and that Johnson was pushing and shoving appellant when Turner came out of the house. The latter was corroborated by Alex who testified that Johnson pushed appellant when the latter tried to approach Turner.

Appellant's claim that Johnson's statement right before the

shooting: "Go ahead, I can at least take one" was addressed at Brewer and could have provided sufficient provocation for the shooting, is taken out of context and is unsupported by the evidence. As mentioned earlier, the record convincingly shows that right before the shooting appellant was reaching toward the door of his car and was facing the crowd on the street rather than Brewer or his blue car.[9/] Moreover, Turner testified that the Johnson statement, "I could take at least one" was directed at Jester Taggart.[10/]

In sum, since Johnson did not personally argue, quarrel with or provoke Brewer, the other crime evidence involving a personal confrontation between Brewer and his victim was simply not sufficiently similar (and hence relevant) to prove Brewer's state of mind in committing the charged offense. Evidence of the prior robbery was properly excluded by the trial court as irrelevant. (Evid. Code, § 350.)

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9. The pertinent part of Turner's testimony reads as follows: "Q. Now, just prior to the shooting, within seconds, did you hear anybody say anything? [¶] A. Before the shooting? [¶] Q. Just before the shooting. [¶] A. Say, 'Watch out, he's gonna shoot.' [¶] Q. Who said that? [¶] A. Sounded like Jester Taggart. [¶] Q. Did Mr. Johnson say anything before he was shot? [¶] A. He said, 'Yes, I can at least take one.' [¶] Q. Could you tell where he was, where he was faced in relationship to this blue car he said this? [¶] A. He wasn't faced towards the blue car. He was faced towards the street. [¶] Q. Facing where? [¶] A. Towards the street." (emphasis added.)

10. Excerpts from Turner's testimony on redirect: "Q. And I asked you" 'Now, did you hear Mr. Johnson say anything before he was shot?' Your reply? [¶] A. 'Yeah.' [¶] Q. Did I say - - I asked you, 'Did you' - - [¶] A. 'Yeah.' [¶] Q. 'And what did he say?' [¶] A. 'He said, "I could take at least one."' [¶] Q. Did I ask you then: 'Who was that - - who were those directed towards?' What was your answer? [¶] A. 'Jester Taggart.' [¶] Q. Did I ask you: 'Where was Jester Taggart?' [¶] A. 'On the corner of Simonton Street.' [¶] Q. Did I ask you: 'In relationship to the car where the shots came from, where was he?' What did you say? [¶] Right here? [¶] Q. Yes. [¶] A. 'In relationship' - - [¶] Q. And I asked you: 'How close to the car was he?' [¶] A. 'About 15 feet.' [¶] Q. 'So, Mr. Johnson says to Jester Taggart that he could take one of them?' [¶] A. 'Yeah.' " (Emphasis added.)

Moreover, the other crime evidence was also excludable pursuant to Evidence Code section 352. Under this section the court, in its discretion, may exclude evidence if its probative value is outweighed by its prejudicial effect or if its admission would confuse the issue or mislead the jury. The discrepancies between the evidence of the charged offense and the proffered evidence of the other crime affected not only the relevancy, but also justified the trial court in excluding such evidence for lack of its probative value and also because the offered evidence would only confuse the issue and/or mislead the jury. The trial court has wide discretion under Evidence Code section 352 to exclude such evidence and its ruling will not be disturbed on appeal in the absence of showing an abuse of discretion. (*People v. Diamond* (1970) 10 Cal.App.3d 798, 801.)

Appellant's assertion that the other crime evidence falling within the purview of Evidence Code section 1101, subdivision (b), is not subject to the court's discretionary power under Evidence Code section 352, is incorrect. As our Supreme Court succinctly stated in *People v. Thompson, supra*, 27 Cal.3d 303, 317, footnote 17: "[E]vidence of other crimes is not automatically admissible under subdivision (b) whenever it is offered to prove an intermediate fact other than disposition. Subdivision (b) merely clarifies the fact that subdivision (a) 'does not prohibit' the admission of such evidence when it is offered to prove a fact other than disposition. (Cal. Law Revision Com. comment to Evid. Code, § 1101.) *The evidence of other crimes must still satisfy the rules of admissibility codified in sections 210, 350 and 352.*" (Emphasis added.)

(2) Adoptive Admissions: During the course of the trial, Oden testified, without contemporaneous objection by defense counsel, concerning the conversation between Brewer and appellant after the shooting. According to Oden, Brewer reported to appellant that "he had tooken care of that." Appellant then told Brewer, "he didn't have that right now, but he [Brewer] could come back later and he [appellant] would give it to him." Appellant asked Brewer what happened.

Brewer replied, "You don't have to worry about him no more."

Counsel for appellant subsequently argued in chambers that these statements were not admissible as admissions or coconspirator declarations. The trial court admitted them as adoptive admissions. Because there was conflicting evidence as to whether appellant was present when Brewer made these remarks, the question of appellant's presence correctly was left for the jury to resolve. Having admitted the evidence, the trial court instructed the jury on adoptive admissions using CALJIC No. 2.71.5 (4th ed. 1979).[11/] Appellant now claims he was denied effective assistance of counsel because trial counsel failed to object to admission of the evidence in a timely fashion or to move to have it stricken. He also asserts the statements were inadmissible as adoptive admissions and challenges the legality of CALJIC No. 2.71.5.

The test for establishing ineffective assistance of counsel is twofold. In addition to showing that counsel failed to act in a manner comporting with that of a reasonably competent lawyer, defendant must also demonstrate that absent counsel's inadequacies it is reasonably probable a more favorable determination would have resulted. (*People v. Gates* (1987) 43 Cal.3d 1168, 1183.) Because we conclude the evidence was properly admitted, we need not further address the competency issue.

Evidence Code section 1221 embodies the adoptive admission exception to the hearsay rule: Evidence of a hearsay statement offered against a party is admissible as an adoptive admission "if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." When a person is accused of committing a crime under circumstances affording him an opportunity to refute the accusation, and where there is no indication that he or she is relying on Fifth

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11. All CALJIC instructions referred to are from the fourth edition unless otherwise noted.

Amendment rights, the accusation and silence or equivocation are admissible as an adoptive admission of guilt. (*People v. Preston* (1973) 9 Cal.3d 308, 313-314.) The party need not explicitly acknowledge the veracity of the accusatory statement; the typical response is one of evasion, equivocation or even silence. (*People v. Humphries* (1986) 185 Cal.App.3d 1315, 1335.)

Appellant insists that in the present case Brewer's comments were not accusatory; nor did they compel a response from appellant. Thus he argues no inference reasonably could be drawn from his response. We disagree. Under the circumstances Brewer's statement was an admission on his part that he had performed the contract which, in turn, carried the implied accusation that appellant had hired him to carry out the killing. Appellant's silence or failure to refute the statement, coupled with the equivocal response that he didn't have "that" right now and his further inquiry as to exactly what happened, manifested adoption of Brewer's accusatory statement.

Finally, appellant also assails the legality of CALJIC No. 2.71.5, complaining that it incorrectly sets forth the requisite findings to be made by the jury with respect to adoptive admissions.[12/] According to appellant, the objectionable instruction fails to instruct the jurors that they must determine whether the appellant's failure to reply showed criminal intent

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12. The following instruction, modeled closely after CALJIC No. 2.71.5, was given to the jury: "If you should find from the evidence that there was an occasion when the Defendant, under conditions which reasonably afforded him an opportunity to reply, failed to make denial or made false, evasive or contradictory statements in the face of an accusation expressly directed to him or in his presence charging him with the crime for which he is now on trial or tending to connect him with its commission, and if you should find that he heard the accusation and understood its nature, the circumstance of his silence or the conduct on that occasion may be considered against him as indicating an admission that the accusation thus made was true. [¶] Evidence of such an accusatory statement is not received for the purpose of proving its truth, but only as it supplies meaning to the silence and conduct of the accused in the face of it; and unless you should find that his conduct at the time indicated an admission that the accusatory statement was true, you should entirely disregard the statement."

or consciousness of guilt. Appellant is manifestly wrong; the instruction ends with very clear directions to ignore the statement if the incriminating inference cannot be drawn from appellant's conduct: "[U]nless you should find that his conduct at the time indicated an admission that the accusatory statement was true, you should entirely disregard the statement."

C. Jury Instructions

(1) Transferred Intent Instruction: As pointed out earlier, appellant's liability was predicated on the doctrines of aiding and abetting and transferred intent. If a person purposely or by deliberate and premeditated malice attempts to kill one person, but by mistake or inadvertence kills another instead, the law transfers the intent and the homicide so committed is murder of the first degree. (*People v. Sears* (1970) 2 Cal.3d 180, 189; *People v. Siplinger* (1967) 252 Cal.App.2d 817, 825.) In accordance therewith, the jury was instructed per CALJIC No. 8.65 which states, "When one attempts to kill a certain person, but by mistake or inadvertence kills a different person, the crime, if any, so committed is the same as though the person originally intended to be killed had been killed." Appellant claims that the instruction given in the language of CALJIC No. 8.65 was inadequate in the present case and that the trial court had a sua sponte duty to further instruct that if Brewer killed Johnson for independent, personal reasons rather than by mistake or inadvertence, appellant could not be held criminally liable for Brewer's act. Appellant's point is not well taken.

It is settled law that in a criminal case the trial court must instruct the jury sua sponte on the general principles of law relevant to the issues raised by the evidence, but need not instruct on specific points developed at trial. (*People v. Flannel* (1979) 25 Cal.3d 668, 682.) The general principles of law governing the case are those principles closely and openly connected with the facts before the court and which are necessary for the jury's understanding of the case. (*People v. St.*

Martin (1970) 1 Cal.3d 524, 531.) While the duty to instruct on the general principles of law extends also to the defenses raised in the case, the obligation to give sua sponte instruction on a particular defense arises only if the defendant relies on such defense and there is substantial evidence supporting the same. (*People v. Sedeno* (1974) 10 Cal.3d 703, 715, overruled on other grounds in *People v. Flannel, supra* 25 Cal.3d at p. 684; *People v. Wickersham* (1982) 32 Cal.3d 307, 326.) Substantial evidence cannot be equated with "any" evidence; it must be of ponderable significance, reasonable in nature, credible and of solid value. (*Estate of Teed* (1952) 112 Cal.App.2d 638, 644; see also *People v. Johnson, supra*, 26 Cal.3d at p. 576.)

When viewed under these principles, appellant's claim of error must be rejected because the instruction of the trial court was both correct and complete; it clearly specified that the transferred intent applied only if the killing of the unintended victim (i.e., Johnson) took place by mistake or inadvertence. Consequently, the additional instruction (i.e., that the theory of transferred intent was inapplicable if Brewer killed Johnson, the unintended victim for independent, personal reason rather than by mistake or inadvertence) would have been redundant; it would have amounted to no more than a further elaboration of a point adequately covered by the instruction already given. The trial court's duty to instruct sua sponte does not extend to redundant or cumulative instructions which go beyond the general principles of law and are unnecessary for the jury's understanding of the case. (*People v. St. Martin, supra*, 1 Cal.3d at p. 531.)

Furthermore, appellant's contention fails for lack of substantial evidence showing that Brewer killed Johnson for a personal reason, independent of the contract to kill Turner. Contrary to appellant's insistence, the evidence introduced at trial conclusively establishes that Brewer shot Johnson under the mistaken belief that he was Turner. This conclusion is inescapable since the murder for hire targeted Turner and immediately after the shooting Brewer showed up at appellant's

house to claim his bounty for carrying out that contract.

The evidence cited by appellant to prove that Brewer intentionally shot Johnson (i.e., Johnson stood but a few feet away; the projectories and angles of the projectiles indicated that Johnson was the intended target; Turner was pointed out to Brewer prior to the killing) neither precludes nor contradicts the jury's conclusion that Brewer mistakenly believed he had shot Turner. This is especially so in view of the fact that Brewer had only a brief glimpse of Turner before he left the scene and returned to commit the crime and in view of the uncontradicted evidence that following the shooting he expressed his belief that he had killed Turner, the subject of the contract. Moreover, the record is devoid of any substantial evidence that Brewer entertained personal malice or any independent motive toward Johnson. The swearing and arguments on the part of Johnson were directed at the crowd and appellant; Brewer was only an observer, not a target, of Johnson's animosity. Finally, we fail to see how the statement that Johnson was "talking a mile a minute" would provide Brewer with a personal, independent motive for shooting Johnson. In sum, since appellant failed to produce substantial evidence to support the defense hypothesis that Brewer had an independent motive to kill Johnson, the trial court was under no sua sponte duty to instruct on that theory.

(2) Scope of Aider and Abettor Liability: As pointed out earlier, the aider and abettor is liable not only for the planned crime he intended to facilitate, but also for the natural and reasonable or probable consequences of any act (including any reasonably foreseeable offense) he knowingly and intentionally encouraged. (*People v. Beeman, supra*, 35 Cal.3d at p. 560; *People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5.) Consistent therewith, the trial court instructed the jury per CALJIC No. 3.00: "One who aids and abets is not only guilty of the particular crime that, to his knowledge, his confederates are contemplating committing, but he is also liable for the natural and reasonable or probable consequences of any act that he knowingly or intentionally aided or encouraged."

Appellant contends that since the determination of whether an unplanned crime is the natural and reasonable consequence of the planned offense which the defendant allegedly assisted is a question of fact (*People v. Durham, supra*, 70 Cal.2d at p. 181; *People v. Rogers* (1985) 172 Cal.App.3d 502, 515), the trial court should have given a supplemental instruction delineating the jury's fact-finding obligation (*People v. Hammond* (1986) 181 Cal.App.3d 463) and that its failure to do so constituted error. We agree.

The case in point is *Hammond*. Similar to the case at bench, the defendant in *Hammond* was tried as an aider and abettor to a felony murder committed during a robbery, and as to the foreseeable consequence doctrine the jury was instructed per CALJIC No. 3.00. On appeal defendant contended that CALJIC No. 3.00 is erroneous and should be supplemented because it instructs the jury to *assume rather than find* whether the unplanned crime was in fact a natural and probable consequence of the planned crime. The reviewing court agreed and held that "when, as here, a defendant is charged not only with the perpetrator's planned offense but with another offense ultimately committed as a natural and probable consequence thereof, CALJIC No. 3.00 (4th ed. 1979) [including the 1984 revision]) should be supplemented with an instruction clarifying the jury's related responsibility to determine whether the act committed was in fact a natural and probable consequence of the criminal act knowingly and intentionally encouraged." (*People v. Hammond, supra*, 181 Cal.App.3d at p. 469.)

However, as in *Hammond*, we find that the instruction error here was harmless. Appellant's main theory that Brewer's act was unforeseeable because he killed Johnson for independent reasons or motive is not substantiated by the record. (See discussion, *supra*). Furthermore, since the agreement between appellant and Brewer called for killing Turner, a human being, it was reasonably foreseeable that Brewer by mistake of inadvertence could kill the wrong person. Under these circumstances it is not reasonably probable that in the absence

of the instructional error a more favorable verdict to appellant would have been reached; as a consequence the error must be deemed harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Appellant additionally contends that CALJIC No. 3.00 (1984 revision) should have been accompanied by supplemental instructions elaborating the basis for resolving the foreseeability determination. We disagree.

Here, the instruction itself stated that the aider and abettor is guilty of the "natural and reasonable or probable consequences" of acts he knowingly and intentionally encouraged. Such an instruction amplifies sufficiently the test of foreseeability and informs the jury concerning the analysis required. Moreover, trial courts do not have a sua sponte duty to give amplifying instructions when the terms employed in the instructions are commonly understood by persons familiar with the English language; such a duty arises only where the terms have a "technical meaning peculiar to the law." (*People v. Anderson* (1966) 64 Cal.2d 633, 639-640; *People v. Montero* (1986) 185 Cal.App.3d 415, 430.) The phrase "natural and reasonable or probable consequences" does not have a technical meaning peculiar to the law and we presume it to be within the common understanding of jurors, such that further elaboration is not required.

Appellant further urges us to rule that CALJIC No. 3.00 (1984 revision) is constitutionally infirm because it (1) substitutes negligence for specific intent as the mens rea for accomplice liability, and (2) permits a lesser mens rea to convict the accomplice than to convict the principal for the same crime. In support of his argument appellant cites numerous commentators, including the drafters of the Model Penal Code, as criticizing the foreseeable consequences doctrine.

The answer to appellant's contention is *People v. Croy, supra*, 41 Cal.3d 1, where our Supreme Court upheld the constitutionality of CALJIC 3.00 by stating: "The requirement that the jury determine the intent with which a person tried as an

aider and abettor has acted is not designed to insure that his conduct constitutes the offense with which he is charged. His liability is vicarious. Like the conspirator whose liability is predicated on acts other than and short of those constituting the elements of the charged offense, if the acts are undertaken with the intent that the actual perpetrator's purpose be facilitated thereby, he is a principal and liable for the commission of the offense. Also like a conspirator, he is guilty not only of the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he aids and abets . . . . [¶] It follows that a defendant whose liability is predicated on his status as an aider and abettor need not have intended to encourage or facilitate the particular offense ultimately committed by the perpetrator. *His knowledge that an act which is criminal was intended, and his action taken with the intent that the act be encouraged or facilitated, are sufficient to impose liability on him for any reasonably foreseeable offense committed as a consequence by the perpetrator.* It is the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense, which *Beeman* holds must be found by the jury. [Citation.]" (At p. 12, fn. 5, emphasis added; accord *People v. Luparello* (1986) 187 Cal.App.3d 410, 441.) It is, of course, elementary that under the doctrine of stare decisis we are bound to follow the decisions of our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Finally, appellant argues that since the jury was instructed on "alternative" theories of aider and abettor liability, the judgment of first degree murder must be reversed because the reviewing court cannot determine from the record which theory formed the basis for the verdict.[13]

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13. The jury was also instructed in the language of CALJIC No. 3.01 (1984 Revision) as follows: "A person aids and abets the commission of a crime when he or she, one with knowledge of the unlawful purpose of the perpetrator and two with the intent or purpose of committing, encouraging or facilitating the commission of the offense, by act or advice, aids,

This contention of appellant cannot stand for two chief reasons. One, the law is well established that if one of the two theories is supported by overwhelming or strong or convincing evidence, the judgment based upon the verdict will not be reversed even if the alternative theory rests on erroneous instruction. (*People v. Haskett* (1982) 30 Cal.3d 841, 851; *People v. Camden* (1976) 16 Cal.3d 808, 816; *People v. Atkins* (1982) 128 Cal.App.3d 564, 569.) The proposition that appellant hired Brewer to kill (not only to beat up) Turner and that Brewer proceeded to carry out the agreement with appellant's intent, knowledge and encouragement, is supported not only by strong or overwhelming, but virtually conclusive evidence. (See discussion, *supra*.) Two, appellant's assertion is based upon the hypothesis that the foreseeable consequences instruction was prejudicially erroneous. Since we have concluded otherwise, appellant's contention automatically fails.

(3) *Mental Retardation Defense*: A defense psychologist testified that appellant, with a full scale "IQ" of 75, was borderline mentally retarded. The jury received no instructions relating that evidence to any legal defense to the charged crimes. Appellant now submits that the trial court had a sua sponte duty to provide instructions on the defense of idiocy found in section 26, which provides in pertinent part as follows: "All persons are capable of committing crimes except . . . idiots."

In *In re Ramon M.* (1978) 22 Cal.3d 419, the Supreme Court reviewed the limited treatment afforded to the idiocy defense by the courts and determined that because the terms "idiocy," "lunacy" and "insanity" all described mental conditions rendering a defendant not "of sound mind," a single test would suffice to define each defense. (*Id.*, at p. 415.) Moreover, the Supreme Court had just repudiated the M'Naghten test of insanity, adopting instead the American Law Institute (ALI) formulation. (*People v. Drew* (1978) 22 Cal.3d 333, 339, 348.[14]

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promotes, encourages or instigates the commission of the crime."

14. The ALI formulation reads as follows: "A person is not

Against this background the court then concluded that (1) the ALI tests encompasses both idiocy and insanity; (2) the defense of idiocy is governed by the ALI standard; and (3) mental retardation thus constitutes a defense to criminal conduct if "'at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.'" (*In re Ramon M., supra*, 22 Cal.3d at p. 428.)

At the time *Ramon M.* was decided, the statutory scheme governing the insanity and idiocy defenses was substantially different from the present scheme. We start with section 20, requiring that a union of act and intent must exist in every crime. As to intent, former section 21, enacted in 1872, provided: "The intent . . . is manifested by the circumstances connected with the offense, and the sound mind . . . of the accused," "sound mind" being defined by exclusion to refer to everyone *except* idiots, lunatics or persons affected with insanity. The 1981 amendment to section 21 deleted reference to the sound mind of the accused and the definition thereof. (Stats. 1981, ch. 404, § 1, p. 1591.) Concurrently, former subdivision three of section 26, which included lunatics and insane persons within the class of persons incapable of committing crimes, was also deleted by amendment. (Stats. 1981, ch. 404, § 3, p. 1592.) Finally, the electorate in 1981 adopted the initiative measure popularly known as Proposition 8 which restored M'Naghten as the proper test for the insanity defense. (§ 25, subd. (b).)[15]

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responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." (Model Pen. Code (Proposed Official Draft 1962) § 4.01, subpart (1).)

15. Section 25, subdivision (b), provides that the defense of insanity requires proof by a preponderance of the evidence that defendant was "incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the

The thrust of these changes is that idiocy, which previously was linked statutorily with lunacy and insanity by virtue of former sections 21 and 26, now stands alone in section 26. We nonetheless think that the logic compelling the *Ramon M.* court link the test for idiocy with the test for insanity still applies because they both describe mentally disabling conditions. Under this analysis, the proper test for mental retardation would be the M'Naghten rule. (§ 25, subd. (b).)

We return now to appellant's allegation of error, observing again that the trial court's sua sponte obligation to instruct on a specific defense only arises when a defendant relies on such defense or substantial evidence is adduced supporting the defense and the defense is compatible with defendant's theory of the case. (*People v. Sedeno, supra*, 10 Cal.3d at p. 716.) Here the record is devoid of *any* reliance on the part of appellant on the defense of idiocy. To the contrary, defense counsel made it clear in closing argument that the purpose of testimony concerning appellant's mental functioning was to assist the jury in evaluating statements made by appellant to the police, his theory being that a man with an "IQ" of 75 does not carefully select his language. This theory was also alluded to by the trial court when it responded to the jury's inquiry that sanity was not an issue in the case, the psychologist's testimony being proffered on the issue of appellant's ability to communicate. Additionally, there was not a shred of evidence produced at trial concerning appellant's capability to understand the "nature and quality" of his acts or to distinguish right from wrong at the time of commission of the crime. Since the evidence did not raise an issue as to the mental retardation defense as we understand it, there was no sua sponte duty to so instruct.

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commission of the offense." In *People v. Skinner* (1985) 39 Cal.3d 765, 776-777, the Supreme Court clarified that the use of the conjunctive "and" was a drafting oversight and that the statutory provision should be read in the traditional sense such that the disjunctive "or" connects both prongs of the M'Naghten test.

III. SPECIAL CIRCUMSTANCES ISSUES

A. Sufficiency of the Evidence

Appellant argues that the evidence was insufficient to establish the special circumstance of intentional murder carried out for financial gain. The two "hubbas" originally offered to Brewer were worth $50 at most. Appellant asserts this offer did not constitute valuable consideration within the meaning of section 190.2, subdivision (a)(1). He further argues that the homicide was primarily motivated by retaliation, and that such an insignificant consideration does not constitute a murder "carried out for financial gain." Finally, appellant contends the doctrine of transferred intent should not apply to the financial gain special circumstance.

These contentions must fail. First, the term "valuable consideration" has no application to the case at bar. Former section 190.2, subdivision (a) (Stats. 1977, ch. 316, p.1257), included a murder for hire special circumstance which referred to an "agreement by the person who committed the murder to accept a valuable consideration ...." The present death penalty statute, added by initiative measure in 1978, carries no reference to "valuable consideration," casting the special circumstance as follows: "The murder was intentional and carried out for financial gain." (§ 190.2, subd. (a)(1).)

Second, there is no quantum requirement attached to the concept of "financial gain" and, hence, the term is not stretched beyond its ordinary usage by including the value of two "hubbas" within its purview. Further, contrary to appellant's assertion, there is no reasonable doubt concerning the meaning of "financial gain" and the value attached to the concept. Rather, the statute requires only that the victim's death serve as "consideration for, or an essential prerequisite to, the financial gain sought by the defendant." (*People v. Bigelow* (1984) 37 Cal.3d 731, 751.) And in a murder-for-hire situation, the person who intentionally aids and abets the killer in the commission of

a first degree murder for the perpetrator's own financial gain becomes subject to special circumstance punishment by virtue of section 190.2, subdivision (b). (*Id.*, at p. 750, fn. 11; *People v. Freeman* (1987) 193 Cal.App.3d 337, 339.) Thus the defendant/hirer need not himself be financially motivated. (*Ibid.*)

Third, we disagree that from Brewer's vantage, the homicide was motivated primarily by retaliation, presumably as opposed to financial gain. The only evidence concerning retaliation relates to appellant's motive in hiring Brewer in the first instance. Concerning the allegation that Brewer killed Johnson for independent reasons of personal malice, the evidence does not support such a contention.

Fourth, the fact that Johnson was mistakenly or inadvertently killed instead of Turner does not preclude application of the financial gain special circumstance. From the killer's perspective, an intentional murder was committed with a view to financial reward. The court in *People v. Howard* (1988) 44 Cal.3d 375, cautions us that the relevant inquiry is "the particular defendant's purpose, whether or not achievable." (P. 410, fn. 8.) In cases where financial gain must be analyzed vis-a-vis the hired killer, the killer's purpose becomes the proper focus for determining applicability of the statute once the threshold derivative liability has been established. Here, there was evidence that Brewer intentionally killed the victim in order to obtain a financial benefit. The fact that he killed the wrong person does not detract from his purpose.

Based on our review of the record and contrary to appellant's contentions, we find there to be substantial evidence from which a rational trier of fact could conclude that (1) as between appellant and Brewer, Turner's death was consideration to appellant for a financial gain sought by Brewer, and (2) Brewer mistakenly or inadvertently killed the actual victim in order to benefit financially. Appellant offered Brewer either two "hubbas" or $200 (reduced to $100 because of the mistake) to beat up, shoot or kill Turner; and based on appellant's own

admission, he hired Brewer to kill Turner. The evidence also shows that Brewer acted on his agreement with appellant in order to fulfill its terms. Following his initial discussion with appellant, Brewer proceeded to arm himself and then continued to the site of the killing, observing the various actors. After the shooting, he sought his reward.

B. Financial Gain Instructions

As to the special circumstances allegedly present in this case, the trial court instructed the jury that if it found appellant guilty of murder in the first degree, "you must then determine if the murder was committed under the following special circumstance: intentional murder for financial gain . . . . [¶] To find the special circumstance referred to in these instructions as murder for financial gain is true, each of the following facts must be proved: [¶] One, that the murder was intentional; and [¶] Two, that it was carried out for financial gain."

Appellant would have us agree that the trial court had a sua sponte duty to define financial gain to include the element of motive as a prerequisite to sustaining the special circumstance. According to appellant this "error" was exacerbated by inclusion of the following instruction, patterned after CALJIC No. 2.51, within the instructions presented to the jury: "Motive is not an element of the crime charged and need not be proved. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt; absence of motive may tend to establish innocence. You will therefore[ ] give its presence or absence, as the case may be] the weight for which you find it to be entitled."

Our disagreement with appellant takes on a twofold analysis. First, we reiterate that under *Bigelow* and its progeny, rather than being subjected directly to the financial gain special circumstance, the hirer of a paid killer is subject derivatively under section 190.2, subdivision (b). (*People v. Bigelow, supra*, 37 Cal.3d at p. 750, fn. 11; *People v. Freeman, supra*, 193

Cal.App.3d at pp. 339-340.) Thus the inclusion of CALJIC No. 2.51 was entirely appropriate given that *as to the appellant*, financial motivation was not an issue. *His* crime, if any, was as an aider and abettor of an intentional murder carried out by the killer for financial gain.

Secondly, as to Brewer, there was no need to further define financial gain. Absent a request for amplification, it is sufficient for the court to define the elements of a crime by instructing in the unadorned language of the statute, but only if the jury easily could understand the statute without further guidance. (*People v. Failla* (1966) 64 Cal.2d 560, 565; see also *People v. Howard, supra*, 44 Cal.3d at p. 408.) If a term has a technical meaning peculiar to the law, the court on its own motion must supply the appropriate amplification; commonly understood terms do not require further embellishment. (*People v. Anderson, supra*, 64 Cal.2d at 641.)

The question then becomes whether the limiting construction of the financial gain special circumstance announced by the Supreme Court in *People v. Bigelow, supra*, 37 Cal.3d 731, is required in the present case. In *Bigelow*, the Supreme Court was concerned with the problem of multiple and overlapping findings of special circumstances based on the same conduct, most notably the overlap between the financial gain special circumstance and that of felony murder (§ 190.2, subd. (a)(17)), "since most robberies, as well as many burglaries, kidnapings and arsons, are committed for financial gain." (*Id.*, at p. 750.) Accordingly, the Supreme Court adopted a restricted formulation pursuant to which "the financial gain special circumstance applies only when the victim's death is the consideration for, or an essential prerequisite to, the financial gain sought by the defendant." (*Id.*, at p. 751.)

In *People v. Howard, supra*, 44 Cal.3d at p. 408, the Supreme Court decided that the phrase "for financial gain" is not a technical term except for the *Bigelow* limitations, and further cautioned that while the *Bigelow* articulation should be applied when important to avoid overlap, "it is not intended to restrict

construction of 'for financial gain' when overlap is not a concern." (P. 410.) Here we have no *Bigelow* concern and we do not think the meaning of the term "for financial gain"caused confusion. The statute adequately addresses the concept of motive in a non-*Bigelow* setting through the straight forward language "*for* financial gain."

C. Intent to Kill

Appellant challenges the special circumstances instructions as failing to require a specific intent to kill on his part. We agree with appellant that instructions on proof of intent to kill were required in his case, but contrary to appellant's assertions, the instructions were sufficient.

Specifically, the following instructions patterned in part after section 190.2, subdivision (b), were given: "If Defendant, Robert Henry, was an aider and abettor but not the actual killer, it must be proved beyond a reasonable doubt that he intended to aid in the killing of a human being before you are permitted to find the alleged special circumstance of that first degree murder to be true as to Defendant . . . . [¶] If the Defendant intentionally aided, abetted, counseled, commanded, induced, solicited, requested or assisted any actor in the commission of murder in the first degree, which murder was intentional and which was carried out for financial gain, you should find the special circumstance to be true."[16]

Appellant's constitutional arguments aside, when a defendant is guilty as an aider and abetter, section 190.2,subdivision (b), itself compels proof that he or she acted with intent to kill as a

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16. Section 190.2, subdivision (b), subjects a defendant to special circumstances findings under the following situation, among others: "Every person whether or not the actual killer found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting or assisting any actor in the commission of murder in the first degree . . . in any case in which . . . the special circumstances enumerated in [paragraph] (1) . . . of this section has been specially found . . . to be true."

prerequisite to finding that the financial gain special circumstance is true. In *Carlos v. Superior Court* (1983) 35 Cal.3d 131, 153, 154, the Supreme Court construed the word "intentionally" in section 190.2, subdivision (b), to apply to *all* defendants, perpetrators and accomplices alike, such that a defendant could not be subject to the felony murder special circumstance absent proof of intent to kill. The Supreme Court recently overruled *Carlos*, determining instead that intent to kill is not an element of the felony-murder or multiple-murder special circumstances, "but when defendant is an aider and abettor rather than the actual killer, intent must be proved." (*People v. Anderson* (1987) 43 Cal.3d 1104, 1147, 1149.) In reaching this decision, the court concluded as a general matter that "section 190.2, [subdivision] (b) lays down a special rule for a certain class of first degree murderers: if the defendant is guilty as an aider and abetter, he must be proved to have acted with intent to kill before any special circumstance (with the exception of a prior murder conviction) can be found true." (*Id.*, at p. 1142.)

This general conclusion was not arrived at through tortured statutory analysis; nor does the court's reasoning indicate that section 190.2, subdivision (b), is at all confusing or ambiguous in its intent to kill requirement as to aiders and abettors. On the contrary, the straightforward language of the statute compels this determination.

Likewise, the instant instruction, paralleling closely the language of section 190.2, subdivision (b), mandates proof of intent to kill. Appellant, however, contrasts these instructions with the instructions given in *People v. Fuentes* (1985) 40 Cal.3d 629, positing that while the *Fuentes* instructions properly instruct on intent to kill, the present instructions do not. In *Fuentes*, the jury was instructed as to sustaining the special circumstance allegation (commission of murder during attempted commission of robbery) that if defendant were an aider and abettor, "it would have to find that he 'intentionally aided . . . the actual killer in the commission of the murder of

the first degree with the specific intent to take a human life' . . . ." (*Id.*, at p. 639.)

Fuentes was a pre-*Anderson* decision wherein the court was concerned with *Carlos* error. The above instruction was recited in the context of explaining that the trial court failed explicitly to instruct on intent to kill if defendant were the actual killer. By implication it could be argued that the court blessed this instruction as being appropriate on the issue of aider and abettor intent to kill. Be that as it may, the present instruction is not inadequate on the intent issue because it fuses the mens rea of the accomplice with that of the perpetrator–the aider and abettor must *intend* to aid consummation of not just any crime or murder, but specifically a first degree murder which fits the special circumstance allegation in this case, namely, "which murder was intentional and carried out for financial gain." Moreover, the special circumstance requirement that the jury find defendant "intended to aid in the killing of a human being" could not be clearer on the issue of appellant's intent to kill.

Appellant also stresses the prosecutor's reliance on the foreseeable consequences involving an unintended crime and unintended victim, which he maintains aggravated the alleged instructional error.

As to the unintended crime, the return of the special circumstance finding under properly given instructions necessarily precluded the jury from returning a verdict of first degree murder on the basis that the killing was a foreseeable consequence of appellant's intention that Turner be administered a "good ass whipping." As to the unintended victim, the transferred intent instructions appropriately resolved that issue.

IV. MOTION TO DISMISS SPECIAL CIRCUMSTANCE

Appellant finally argues the trial court erred in failing to consider his borderline mental retardation as a mitigating factor when determining whether to exercise its discretion to dismiss

the special circumstances pursuant to section 1385. We disagree.

Section 1385, subdivision (a), provides in relevant part: "The judge or magistrate may, either on his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed." The cases hold that courts have authority under section 1385 to dismiss special circumstance findings in the furtherance of justice, thereby rendering a defendant eligible for parole. (*People v. Williams* (1981) 30 Cal.3d 470, 489; *People v. Lucey* (1986) 188 Cal.App.3d 551, 559.) However, as the Supreme Court has cautioned, the trial court's power to strike must be exercised in a careful and thoughtful manner; it must promote the administration of justice by assuring that the sentence be based upon the particular facts of the offense and all circumstances, and that the punishment exacted be fitting the crime as well as the perpetrator. (*People v. Williams, supra*, 30 Cal.3d at p. 489.)

In the case at bench the trial court complied with the above instructions. After reviewing the evidence and all other circumstances (including appellant's prior violent acts), the court concluded that the protection of society required the denial of the motion to dismiss the special circumstances, because appellant was involved in an intentional killing of a human being and he posed (and will pose) a danger to society. In addition, the record shows on its face that the trial court did consider appellant's mental retardations as a mitigating factor, but found it not to be an excuse to commit murder.[17]

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17. The pertinent part of the record reads as follows: "[The Court:] *It is said that he is not as gifted as some other people might be, but this is not something that the court of law accepts as an excuse.* [¶] *The fact that he did not act as rationally as someone else might have acted is to be expected, certainly in murder. Murder for hire is not a rational act.* It is not rational under any sort of circumstances. [¶] I can in many ways find – I certainly follow the concern that you voice, Mr. O'Hanlon, but it is not something that is contemplated by the law. [¶] I do not see in the course of this case mitigating factors that are sufficient to cause me to strike the

In view of this speaking record, appellant cannot well claim that his reduced mental capacity was not taken into account by the court as a mitigating factor and/or that the trial court has abused its broad discretion in any other way in refusing to dismiss the special circumstance finding in this case.

The judgment is affirmed.

Anderson, P.J.

We Concur:

Poche, J.

Channell, J.

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special circumstances. I frankly have no question as to this Defendant's involvement, having heard the evidence at trial. The only thing that didn't happen that he had intended to happen was a different person was killed. [¶] The fact that the society at which he lives may in a sense almost condone this kind of conduct, it does not excuse it in the greater society which we all live. Certainly I can't take into consideration the cost and that kind of factor. [¶] Therefore, *I intend to do what the law directs me to do, and that is for the protection of society. You may have given all the farious factors of this man's ability, his personality and his intellect.* Those are going to be with him for his life. [¶] *He is a danger to society now and* that ndicates there *is going to be a case in the future.* Therefore, I am going to deny the motion to strike the special circumstances. [¶] *That leaves me one choice in sentencing, and that is to sentence the Defendant* to the Department of Corrections *for life without possibility of parole.* (Emphasis added.)

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Supreme Court
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Disposition Parties and Attorneys Lower Court

DOCKET (REGISTER OF ACTIONS)
HENRY, ROBERT

Case Number S056606

Date	Description	Notes
10/08/ 1996	Petition for writ of habeas corpus filed	By Pro per Petnr Robert Henry
01/28/ 1997	Petition for writ of habeas corpus denied	See Cites

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2004 Judicial Council of California

Filed June 8, 1989

ORDER DENYING WRIT OF HABEAS CORPUS

No. S010192

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

IN RE ROBERT HENRY
ON
HABEAS CORPUS

Petition for writ of habeas corpus DENIED for failure to allege sufficient facts. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)

s/ _____
Chief Justice

California Courts – Appellate Court Case Information

CALIFORNIA APPELLATE COURTS

Case Information

Supreme Court

Court data last updated: 08/08/2007 02:53 PM

Case Summary Docket Briefs
Disposition Parties and Attorneys Lower Court

DOCKET (REGISTER OF ACTIONS)

THE PEOPLE v. HENRY, ROBERT
Case Number S007648

Date	Description	Notes
10/25/ 1988	Petition for review filed	By Aplt
12/22/ 1988	Petition for review denied	

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2004 Judicial Council of California

No. 07-199

11-8-07

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES D. MARSHALL, Warden, *Petitioner*,

v.

ROBERT HENRY

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a court of appeals may remand a case, which is not governed by the substantive provisions of the Antiterrorism and Effective Death Penalty Act, for an evidentiary hearing to determine whether the petitioner can adduce sufficient proof to substantiate a claim of actual innocence.

TABLE OF CONTENTS

Question Presented i

Table of Authorities iii

Statement of the Case 1

I. Summary of the Factual Issues 1

II. Detailed Recitation of the Facts 2

Argument 6

The Discretionary, Interlocutory Order for Fact-Development in this pre-AEDPA Case Raises No Issue of National Importance. 6

I. Summary of Arguments. 6

II. If the Court Were to Issue a Ruling in This Case, It Would Apply To, At Most, a Handful of Pending Pre-AEDPA Cases. 7

III. The Fact-Centered, Case-Sensitive Ruling of the Lower Court Does Not Present an Extraordinary Case that Would Merit Immediate Review of an Interlocutory Order. 12

IV. The Important Question of Whether Federal Habeas Corpus Relief is Available On a Truly Persuasive Demonstration of Actual Innocence Is Not Presented By This Case at this Interlocutory Stage. 13

Conclusion 15

TABLE OF AUTHORITIES

Page(s)

Federal Cases

American Construction Co. v. Jacksonville, T. & K.W. Railway Co., 148 U.S. 372 (1893) 12

Beaty v. Stewart, 303 F.3d 975 (CA9 2002) 8

Brownlee v. Haley, 306 F.3d 1043 (CA11 Cir. 2002) 10

Burton v. Dormire, 295 F.3d 839 (8th Cir. 2002) 10

Carriger v. Stewart, 132 F.3d 463 (CA9 1997) 6, 7

Coley v. Gonzalez, 55 F.3d 1385 (CA9 1995) 11

David v. Hall, 318 F.3d 343 (CA1 2003) 10

De Marco v. United States, 415 U.S. 449 (1974) 8

Estelle v. Gamble, 429 U.S. 97 (1976) 12

Fielder v. Varner, 379 F.3d 113 (CA3 2004), *cert. denied*, 125 S. Ct. 904 (2005) 10

Foster v. Quarterman, 466 F.3d 359 (CA5 2006), *cert. denied*, 127 S. Ct. 2099 (2007) 10

Guidry v. Dretke, 397 F.3d 306, 323-24 (CA5 2005) 8

Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251 (1916) 12

Herrera v. Collins, 506 U.S. 390 (1993) ..... *passim*

House v. Bell, 126 S. Ct. 2064 (2006) 13

Johnson v. Bett, 349 F.3d 1030 (CA7 2003) 10

Keeney v. Tamayo-Reyes, 501 U.S. 1 (1992) 8

Kuhlmann v. Wilson, 477 U.S. 436 (1986) 5

LaFevers v. Gibson, 238 F.3d 1263 (CA10 2001) 10

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 (1923) 13

McKenzie v. Risley, 824 F.2d 1525 (CA9. 1988) 5

Oyama v. California, 332 U.S. 633 (1948) 14

Rouse v. Lee, 339 F.3d 238 (CA4 2003) 10

Smith v. United States, 348 F.3d 545 (CA6 2003) 8

Townsend v. Sain, 372 U.S. 293 (1963) 8

United States v. Booth, 432 F.3d 542 (CA3 2005) 8

United States v. Keogh, 391 F.2d 138 (CA2 1968) 8

United States v. McCoy, 410 F.3d 124 (CA3 2005) 8

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982) 6

Zuern v. Tate, 336 F.3d 478 (CA6 2003) 10

Federal Statutes and Rules

28 U.S.C. § 2243 9

28 U.S.C. § 2254(d) 6

28 U.S.C. § 2254(e)(2) 8

Rule 8, Rules Governing Section 2254 Proceedings .....

State Statutes

California Penal Code § 190 2

MISCELLANEOUS

Nicolas Berg, *Turning a Blind Eye to Innocence: The Legacy of* Herrera v. Collins, 42 Am. Crim. L. Rev. 121 (2005) 12

IN THE SUPREME COURT OF THE UNITED STATES

No. 07-199

CHARLES D. MARSHALL, Warden, *Petitioner*,

v.

ROBERT HENRY

Respondent, Robert Henry, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the lower court's interlocutory memorandum disposition in this case.[1]

STATEMENT OF THE CASE

I. Summary of the Factual Issues

Andre Johnson was murdered while standing next to the driver's door of his car. He was shot four times from a distance of five to fifteen feet. It is undisputed that the shots were fired from a stolen car that was driven by Francis Brewer. Bernard Oden was riding in the front passenger seat of the stolen car.

Robert Henry ("Mr. Henry" or "Robert") was convicted of the first degree murder of Andre Johnson on the sole theory of transferred intent. The State convinced Mr. Henry's jury that he hired Brewer to shoot Cedric Turner, who had stolen money and drugs from Mr. Henry, but Brewer mistakenly shot Johnson instead of Turner.

Brewer was tried after Mr. Henry on the same theory. Witnesses whose evidence was

[1] Respondent has no objection to Petitioner's jurisdictional statement.

unavailable at the time of Mr. Henry's trial testified in Brewer's trial that Oden intentionally shot Johnson for personal and independent reasons while Brewer drove by in the stolen car. Although the prosecution presented evidence that Oden was present when Mr. Henry allegedly offered to pay for an attack on Turner, the jury rejected the prosecution's first-degree murder theory, including the special allegation that Brewer personally used a firearm in the killing.

The jury convicted Brewer of second-degree murder, rejecting a special finding that Brewer acted for pecuniary gain. In other words, Brewer's jury rejected the prosecution's theory; he was *not* a participant in a premeditated killing instigated by the promise of payment from Mr. Henry, but instead was a participant in a spontaneous and unplanned act committed by Oden.[2]

The new testimony at Brewer's trial, reaffirmed in declarations filed with Mr. Henry's habeas corpus petition, thus showed that Mr. Henry played no role in Oden's shooting of Johnson.

II. Detailed Recitation of the Facts

1. During an early morning drug deal gone bad, Robert Henry, then 19 years old, was robbed of drugs and $30 by Cedric Turner. When Robert told his 16 year old brother, Jeffrey Taggart ("Jeffrey"), and his 17 year old cousin, Jester Taggart ("Jester"), what had happened, they decided Turner should be punished and get "a good ass whipping." Mr. Henry asked Francis Lee Brewer to injure or kill Turner. According to the government's theory of the case, later that day, Francis Lee Brewer saw Mr. Henry and others engaged in a heated argument with

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[2] This is the necessary implication of the jury's finding of second-degree murder, which is defined as any murder that does not have the elements of premeditation and deliberation, or was not committed by any of the means listed in the statute. See Cal. Penal Code § 190.

Andre Johnson and, mistakenly believing that Johnson was Turner, shot out the passenger side of a car and killed Andre Johnson. Mr. Henry was convicted of first degree murder, the trial judge finding the special circumstances of murder for profit and use of a firearm. He was sentenced to life without the possibility of parole.

2. Jeffrey testified at Mr. Henry's trial under a grant of transactional immunity that he, his brothers Robert and Gary, and his cousin Jester were brandishing sticks and confronted Turner, who had a gun. Turner retreated into a nearby house. After he was in the house about ten minutes, he came out with Andre Johnson. Turner got into Johnson's car. Mr. Henry and others asked Turner why he was getting in the car and having someone else fight his battle. At that point, Jeffrey testified, Johnson pushed Mr. Henry, and within minutes, a small stolen blue car driven by Brewer with Oden in the passenger seat passed by on the other side of the street, and Oden fired shots out of the driver's side window. Jeffrey testified that he was on the sidewalk near Johnson's car at the time the shots were fired.[3]

3. Two years after Mr. Henry was convicted, Brewer stood trial on the same theory that the prosecution asserted in trying Robert, that is, that Brewer was hired by Robert to kill Turner but mistakenly killed Johnson instead. The evidence at Brewer's trial, however, was markedly different than at Mr. Henry's.[4] At Brewer's trial, Jeffrey testified that he was in back seat of the

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[3] Jester, who went to trial ten days after the jury found Mr. Henry guilty, was convicted of second degree murder for which he received an eight year prison sentence.

[4] At Brewer's trial, as the prosecutor began asking Jeffrey about the car that Brewer and Oden were in on the night of the shooting, Jeffrey asked the judge if he still had the immunity he was granted at Mr. Henry's trial. The prosecutor interjected, "[a]t the earlier trial, he [*i.e.*, Jeffrey] requested immunity and the Court granted him the same, and I assume at this point he's asking for immunity." Jeffrey immediately corrected the prosecutor, saying "I didn't ask for it, he [*i.e.*, the prosecutor] gave it to me. I didn't ask for it. *I didn't know what he meant.*" Outside

small blue car with Brewer and Oden, and had been there for ten minutes before the shooting occurred. He testified that Oden took a rifle from between the front seats and shot Andre Johnson because Oden didn't like the way Johnson was talking. When Jeffrey was asked why he hadn't previously testified that he was in the car from which the shots were fired, he explained, "[b]ecause I was scared – like, that's why I wanted to see if I had immunity." And when asked by the prosecutor why he didn't testify similarly at Mr. Henry's trial, he answered, "[b]ecause I really didn't know what it [*i.e.*, immunity] meant. You didn't explain it to me, and I was still scared if I did say anything."

4. Jeffrey's testimony at Brewer's trial was corroborated by Charles Austin, who had not testified at either Mr. Henry's or Jester's trial.[5] Austin testified that he saw the shooting of Andre Johnson, and that the person who shot him was sitting in the passenger seat of the small blue car. He testified that he saw Brewer, who was driving the car and whose hands were on the steering wheel at the time the shots were fired, look "shocked" after Oden fired the shots. The jury found Brewer guilty of second degree murder and specifically rejected enhancements for personal use of a firearm and killing for a financial motive.

5. After Mr. Henry's conviction and sentence were affirmed on direct appeal, he sought habeas corpus relief in the state courts on the ground, inter alia, that he was actually innocent of

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the presence of the jury, the attorneys and the judge discussed the issue of immunity, with the prosecutor taking the position that the immunity granted at Mr. Henry's trial remained effective, but in an abundance of caution, the court should again grant immunity. When the judge asked Jeffrey if he understood the prosecution's request, Jeffrey replied, "Not really." Again, the matter was explained to Jeffrey, and ultimately the court granted him transactional immunity.

[5] The Warden mistakenly described Austin as Mr. Henry's "former jailhouse companion." (Pet. 14.) In fact, Austin shared a jail cell for approximately two months with Brewer, not Mr. Henry.

first degree murder. No evidentiary hearing was held, and in 1989 the California Supreme Court summarily denied relief without written opinion.

6. In 1994, Mr. Henry filed a pro se petition for writ of habeas corpus in the federal district court, asserting *inter alia* that he was actually innocent of first degree murder based on evidence from Brewer's trial. While the federal petition was pending, Mr. Henry filed another habeas corpus petition raising the actual innocence claim in the state supreme court. That court summarily denied the petition without holding an evidentiary hearing or making any findings of fact.

7. In 2005, the federal district court denied Mr. Henry's habeas corpus petition without holding an evidentiary hearing. In 2007, the court of appeals vacated the judgment and remanded the case for an evidentiary hearing. In a unanimous memorandum disposition,[6] the court emphasized that the case was not governed by the substantive provisions of the Antiterrorism and Effective Death Penalty Act, and therefore it was required to presume the correctness of state court factual findings "unless the record does not support the findings, or unless other defects, not at issue here, are present." (App. 2a) (citing 28 U.S.C. § 2254(d) [(1995)]; *Kuhlmann v. Wilson*, 477 U.S. 436, 459-60 (1986); *McKenzie v. Risley*, 824 F.2d 1525, 1531 (CA9. 1988) (en banc)). The court noted that Mr. Henry had not received an evidentiary hearing in the state courts, and concluded that, "Henry is entitled to an evidentiary hearing in the district court because if the newly-discovered evidence proves to be true, he would have made out a valid freestanding claim of actual innocence by 'affirmatively prov[ing] that he is probably innocent.'"

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[6] The Rules of the Ninth Circuit provide that "[u]npublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion." 9th Cir. R. 36-3(a).

(App. 3a.) (citing *Carriger v. Stewart*, 132 F.3d 463, 476 (CA9 1997) (en banc), and *Herrera v. Collins*, 506 U.S. 390, 417-19 (1993)). The court observed:

> If truthful, the testimony of Jeffrey Taggart and Charles Austin would prove that Henry, while possibly guilty of solicitation, conspiracy, and attempt for hiring a hit man, is not guilty of first degree murder.

(App. 4a.)

The Warden sought reconsideration, but the panel denied the petition, and not a single judge of the court of appeals requested a vote on the suggestion for rehearing en banc. (App. 5a.)

ARGUMENT

The Discretionary, Interlocutory Order for Fact-Development in this pre-AEDPA Case Raises No Issue of National Importance.

I. Summary of Arguments

There are several reasons why this case is inappropriate for review under this Court's Rule 10. *First*, because the federal petition was filed before 1996, the substantive provisions of the AEDPA are inapplicable. Accordingly, (a) a decision in this case would have little if any relevance to the vast majority of cases pending today, (b) the restrictions AEDPA place on a federal habeas court's choice of law, 28 U.S.C. § 2254(d), do not apply, and (c) all but two of the circuit cases cited by the Warden *were* governed by AEDPA, and all are inapposite.

Second, the court of appeals' interlocutory ruling simply provides a procedure for fleshing out the concrete facts so that "the legal question[ ] presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464,

472 (1982). The lower court's decision in this case requires the district court to ascertain the facts *before* it can be determined whether Mr. Henry "would have made out a valid freestanding claim of actual innocence by 'affirmatively prov[ing] that he is probably innocent.'" (App. 3a.) (quoting *Carriger v. Stewart*, 132 F.3d 463, 476 (CA9 1997) (en banc) and citing *Herrera v. Collins*, 506 U.S. 390, 417-19 (1993)). The Warden's question presented overstates the import of the lower court's decision. The lower court's unpublished memorandum provides that under the Ninth Circuit's test in *Carriger*, and the unique factual circumstances of this case, the district court should more fully develop the record.

Third, taking this case in interlocutory posture would be especially improvident in light of the serious nature of the Warden's claim. The Warden contends that even if someone is proven actually innocent in a federal habeas court, the court lacks the power to order him released and the State can still force the person to spend his entire life in prison. That conscience-shocking proposition is best considered in a case in which such a showing has been made, which will properly highlight the gravity of the constitutional question. Waiting for such a case will not significantly harm the State because these cases are exceedingly rare and the prospect of releasing someone, even Mr. Henry (in this case's current posture), is speculative at this point.

II. If the Court Were to Issue a Ruling in This Case, It Would Apply To, At Most, a Handful of Pending Pre-AEDPA Cases.

In this pre-AEDPA case, the lower court exercised its discretion to order development of the factual record so that, after the hearing, a determination can be made as to whether Mr. Henry would meet the high threshold established in *Carriger* for proving his innocence in a post-conviction setting. There is no contention that Mr. Henry was anything but diligent in pursuing

his claims in state court. Therefore, the restrictions this Court placed on evidentiary hearings in *Keeney v. Tamayo-Reyes*, 501 U.S. 1 (1992), and now codified in 28 U.S.C. § 2254(e)(2) (first clause), are not at issue.

That being so, the lower court in this case correctly identified the *pre*-AEDPA "reasonably low threshold" (App. 3A) that a federal habeas petitioner must meet in order to receive an evidentiary hearing, and cited language from *Townsend v. Sain*, 372 U.S. 293 (1963), that a petitioner need show only a colorable claim for relief and the lack of a factual finding from the state courts. *Ibid.* As to this issue – the only issue conclusively decided by the lower court – the federal circuits are in accord. *See United States v. Booth*, 432 F.3d 542, 546 (CA3 2005); *United States v. McCoy*, 410 F.3d 124, 134 (CA3 2005); *Beaty v. Stewart*, 303 F.3d 975, 993 (CA9 2002) (O'Scannlain, J.) ("[t]he pre-AEDPA standard for obtaining an evidentiary hearing is a 'reasonably low threshold for habeas petitioners to meet.' A petitioner is entitled to an evidentiary hearing if he asserts a colorable claim and a state court did not offer a 'full and fair hearing' on the claim."); *Smith v. United States*, 348 F.3d 545, 551 (CA6 2003); *United States v. Keogh*, 391 F.2d 138, 141 (CA2 1968). The lower court's exercise of discretion under *Townsend* is fully consistent with what this Court has held to be the "better practice," *De Marco v. United States*, 415 U.S. 449 (1974) (per curiam),[7] and is entirely within the scope of its authority under 28 U.S.C. § 2243 and Rule 8 of the Rules Governing Section 2254 Cases. *See Guidry v. Dretke*, 397 F.3d 306, 323-24 (CA5 2005) (where AEDPA does not bar hearing, Rule 8(a) gives district

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[7] In *DeMarco*, this Court held that when there exists a disputed factual issue that might be dispositive of the case, the "better practice [is] not to resolve it in the Court of Appeals based only on the materials then before the court. The issue should have been remanded for initial disposition in the District Court after an evidentiary hearing." 415 U.S. at 450.

court broad discretion to conduct hearing).

Even assuming, for the sake of argument, that a pre-AEDPA federal habeas court faced with a claim of innocence would not be able to develop the factual record absent a higher showing than would be required for other claims, the cases in which this question would now arise are as rare as hen's teeth. Thus, as Justice Kennedy observed in a very analogous situation, such rarities do not merit this Court's full attention:

> By definition, the cases within the ambit of the Court's holding are confined to those in which the factual record developed in the state-court proceedings is inadequate to resolve the legal question. I should think those cases will be few in number. *Townsend v. Sain*, 372 U.S. 293, 318 (1963), has been the law for almost 30 years and there is no clear evidence that this particular classification of habeas proceedings has burdened the dockets of the federal courts. And in my view, the concept of factual inadequacy comprehends only those petitions with respect to which there is a realistic possibility that an evidentiary hearing will make a difference in the outcome. This serves to narrow the number of cases in a further respect and to ensure that they are the ones, as JUSTICE O'CONNOR points out, in which we have valid concerns with constitutional error.

Keeney, 504 U.S. at 24 (dissenting opn.).

The Warden in this case points to no evidence whatsoever that this particular class of habeas corpus proceedings – *viz.* non-capital pre-AEDPA cases alleging actual innocence in which the federal habeas court seeks a more developed factual record – has burdened the dockets of the federal courts, or that it is likely to do so in the near future. It is quite unlikely today, over eleven years since the passage of the AEDPA, that more than a handful of such cases are still pending.

Of the circuit cases cited by the Warden that he contends "conflict" with the lower court's ruling in Mr. Henry's case (Pet. 9-10) (all but two of which are governed, unlike this case, by the

substantive provisions of the AEDPA),[8] none addresses the issue actually presented here: whether a court of appeals may remand a case, which is not governed by the substantive provisions of AEDPA, for an evidentiary hearing to determine whether the petitioner can adduce sufficient proof to substantiate a claim of actual innocence. Instead, the cited cases either (1) address completely different issues, such as (a) whether a claim of actual innocence is exempt from, or equitably tolls, the AEDPA statute of limitation,[9] or (b) whether a petitioner is entitled to relief on a claim of actual innocence when the state court held a hearing at which the newly discovered evidence was considered and found implausible,[10] or (2) reach a result preordained by AEDPA's choice-of-law provision, 28 U.S.C. § 2254(d)(1). *See Fielder v. Varner*, 379 F.3d 113, 122 (CA3 2004), *cert. denied*, 125 S. Ct. 904 (2005); *Foster v. Quarterman*, 466 F.3d 359, 367 (CA5 2006), *cert. denied*, 127 S. Ct. 2099 (2007); *Burton v. Dormire*, 295 F.3d 839, 842 (CA8 2002); *Johnson v. Bett*, 349 F.3d 1030, 1038 (CA7 2003); *LaFevers v. Gibson*, 238 F.3d

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[8] The only pre-AEDPA case from outside the Ninth Circuit, cited by the Warden is *Zuern v. Tate*, 336 F.3d 478, 482 n.1 (CA6 2003). That case is of no help to the Warden because it is inapposite. The petitioner in *Zuern* did not assert that he was actually innocent of a killing, only that he lacked the *mens rea* for aggravated murder under Ohio law. Therefore, the Sixth Circuit did not address the issue faced by the lower court in this case. If the Sixth Circuit in *Zuern* had held that *Herrera* conclusively rejected the cognizability of a freestanding claim of innocence based on newly discovered evidence, it would have been in error. As this Court recently indicated, that question remains open. *House v. Bell*, 126 S. Ct. 2064, 2086 (2006).

[9] *See, David v. Hall*, 318 F.3d 343, 347-48 (CA1 2003) (holding that claim is barred by statute of limitation, nevertheless examining newly proffered evidence and concluding that petitioner "has not made out a predicate showing of 'actual innocence.'"); *Rouse v. Lee*, 339 F.3d 238, 255 (CA4 2003) (en banc).

[10] *See Brownlee v. Haley*, 306 F.3d 1043 (CA11 Cir. 2002).

1263, 1265 n.4 (CA10 2001).[11] The important point to remember is that in this case, which is not governed by AEDPA's choice-of-law provision, the lower court simply applied established circuit precedent and ordered an evidentiary hearing because of the case's unique and peculiar facts.[12]

With rhetorical flourish, the Warden conjures the floodgate argument, contending that certiorari should be granted to "stem the inevitable tide of evidentiary hearings on freestanding actual innocence claims that will result from the Ninth Circuit's unprecedented and unwarranted order in this case." Pet. 16. He specifically cites Justice Scalia's concern in *Herrera* that by deciding the case on an arguendo assumption, the majority would cause innocence claims to become "routine and even repetitive," and Justice O'Connor's fear that unless federal habeas relief were reserved for truly persuasive demonstrations of actual innocence, the federal courts

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[11] The courts in the last two cases, *Johnson* and *LaFevers*, denied federal habeas relief only *after* carefully examining the petitioners' evidence of innocence and finding it wanting. *Johnson*, 349 F.3d at 1038 ("[t]he testimony [at the post-conviction hearing], even if we could consider it as a basis for habeas corpus, does not clear Basten"); *see also id.* at 1038-39. ("[t]here is no basis in this record to grant habeas relief based on this [newly discovered] evidence"); *LaFevers*, 238 F.3d at 1265 n.4 (concluding that "the absence of the victim's blood on Exhibit 83 does not demonstrate LaFevers' actual innocence").

[12] Perhaps recognizing that the alleged inter-circuit conflict is more superficial than substantive, the Warden relies upon an alleged *intra*-circuit conflict between this case and *Coley v. Gonzalez*, 55 F.3d 1385 (CA9 1995). *Coley* is an especially thin reed for the Warden for three reasons. First, an alleged conflict between panels of a single circuit is grounds for denying review. *See Davis v. United States*, 417 U.S. 333, 340 (1974) (noting denial of review where petition had alleged only intra-circuit conflict). Second, the court in *Coley* did not fully consider the question presented by this case because the petitioner had defaulted his claims and it was not clear whether he was raising a freestanding claim, or relying upon the fundamental-miscarriage-of-justice exception to the default bar. 55 F.3d at 1387. Third, the *Coley* panel erred in stating that *Herrera* stands for the proposition that innocence is not cognizable on habeas because, as this Court recently stated, that is an open question. *House*, 126 S. Ct. at 2086.

"will be deluged with frivolous claims of actual innocence." Pet. 11, 12. With 14 years of experience since *Herrera* was decided, we now know that the Justices' fears were not realized. In only about 16 cases per year were bare-innocence claims squarely presented to the federal courts:

> When only roughly sixteen cases a year are brought in federal courts in the U.S., most of which are summarily rejected with little or no discussion, it is clear that the consideration of bare-innocence claims comprise a negligible amount of the federal docket. The number of claims brought also belies Chief Justice Rehnquist's conjecture that "few rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence." Though the review implicit in Chief Justice Rehnquist's vision is more rigorous than current federal court practice, the relatively rare but persistent claims lodged by bare-innocence petitioners both before and after *Herrera* seem to indicate that the number of such petitioners is relatively small and finite.

Nicolas Berg, *Turning a Blind Eye to Innocence: The Legacy of* Herrera v. Collins, 42 Am. Crim. L. Rev. 121, 131 (2005) (footnote omitted) (examining and categorizing 173 bare-innocence claims squarely before federal courts since *Herrera* was decided). Thus, even if AEDPA's choice-of-law provision did not preclude relief on freestanding claims of actual innocence, statistics from the last fourteen years belie the Warden's claim that the lower court's unpublished decision has opened a floodgate.[13]

III. The Fact-Centered, Case-Sensitive Ruling of the Lower Court Does Not Present an Extraordinary Case that Would Merit Immediate Review of an Interlocutory Order.

"Clearly, . . . this court should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American*

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[13] In the eight months since the lower court's decision was issued, it has not been cited once.

Construction Co. v. Jacksonville, T. & K.W. Railway Co., 148 U.S. 372, 384 (1893). Certiorari jurisdiction is "to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision . . . . And, except in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Accordingly, the lack of finality in the judgment below may "of itself alone" furnish "sufficient ground for denial of the application." *Ibid.*; *see also Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J., dissenting) (referring to "the Court's normal practice of denying interlocutory review").

The Warden ignores the interlocutory nature of the lower court's ruling and fails even to attempt to make the required showing that immediate review by this Court is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause. In fact, immediate review of the court of appeals' interlocutory ruling would be not only premature but particularly improvident because the ruling is entirely fact-centered and case-specific, and presents no issue "which is of importance to the public, as distinguished from that of the parties." *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923).

IV. The Important Question of Whether Federal Habeas Corpus Relief is Available On a Truly Persuasive Demonstration of Actual Innocence Is Not Presented By This Case at this Interlocutory Stage.

As this Court recently explained, the question whether a freestanding claim of actual innocence is a cognizable ground for federal habeas corpus relief was left open in *Herrera*, and it remains open today. *House*, 126 S. Ct. at 2086. The lower court recognized that this question should be considered, as it was in *House*, on the basis of a complete factual record. Cases involving allegations of innocence are, by nature, contingent on a wide variety of factual

questions such as the relative weights to be given the testimony of witnesses at trial, and in post-conviction, or of two different witnesses. As the lower court recognized, when determining whether a petitioner would be entitled to relief on the basis of innocence a federal habeas court that is not subject to the restrictions of AEDPA "must review independently both the legal issues and those factual matters with which they are commingled." *Oyama v. California*, 332 U.S. 633, 636 (1948).

The lower court recognized that the petitioner in this case, in its present posture, makes a sufficient showing of innocence to merit factual development (a jury presented with evidence unavailable to Mr. Henry's jury acquitted his co-defendant of the crime of which Mr. Henry was convicted). But the court also did no more than assume, as this Court did on the pages of *Herrera* pinpointed in the court's opinion, that a freestanding claim of innocence would lie in habeas if it were based on truly persuasive evidence. Once the record is developed, it may be appropriate for this Court to consider the underlying constitutional question, but to do so now would be premature.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

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Respectfully submitted,

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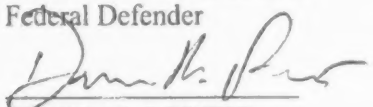

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